CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL., APPELLANTS,

vs.

JACOB U. PAYNE ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MARCH 2, 1897.

(16,501.)

(16,501.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL., APPELLANTS,

vs.

JACOB U. PAYNE ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of the judges	1	1
Statement of facts	1	1
Contract between J. U. Payne & Co. and L. Murray Ferris and Wm. L. Ferris, June 16, 1892	2	1
Questions certified	11	11
Clerk's certificate	12	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 9, 1897.

1 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

THE BURDON CENTRAL SUGAR REFINING COMPANY *et als.*, Appellants,
vs.
JACOB U. PAYNE *et als.*, Appellees. } No. 518.

Appeal from the circuit court of the United States, eastern district of Louisiana.

Before Pardee and McCormick, circuit judges, and Maxey, district judge.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel.

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein—

It is ordered that the following statement and questions of law be certified to said Supreme Court, to wit:

1. H. M. Payne, J. U. Payne, and J. U. Payne & Company, a commercial firm composed of J. U. Payne, J. U. Payne, Jr., and R. W. Foster, all residents of New Orleans, La., were the owners of three contiguous plantations in St. Landry parish, Louisiana, known as Barbreck, St. Peter's, and Anchorage.

2. On June 16th, 1892, they entered into the following contract with L. Murray Ferris & Wm. L. Ferris, of Poughkeepsie, New York, which was duly recorded:

2 This indenture made by H. M. Payne, J. U. Payne, and the firm of J. U. Payne & Co., all residents of the city of New Orleans, State of Louisiana, as the parties of the first part, and L. Murray Ferris and William L. Ferris, both residents of the city of Poughkeepsie, State of New York, as the parties of the second part, witnesseth: That whereas the said H. M. Payne, J. U. Payne and the firm of J. U. Payne & Co., parties of the first part, as aforesaid, are the owners and proprietors of three certain plantations, to wit: the Barbreck, St. Peter's and Anchorage places, their respective interest in the said three plantations being of record in the said parish, and

Whereas, the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, for a lease of the Barbreck sugar-house, and the purchase of the crops of the three aforesaid plantations:

Now therefore, the said parties of the first part, each for and as regards his respective interest in the said plantations, and the said parties of the second part jointly and severally, hereby contract, obligate and bind themselves as follows, to wit:

Article first.

The parties of the first part grant to the parties of the second part, upon the terms and conditions hereafter provided, a lease for a period of ten years, of the sugar-house situated on the Barbreck plantation, together with all the machinery and appurtenances thereto belonging, it being understood and agreed that this lease shall cover and include all the present enclosure around the Barbreck sugar-house and so much in addition towards the Anchorage plantation as may be necessary to provide space for handling cars, and, further, the land between the cane yard and the bayou, except the public highway, which shall be used in common by the parties hereto, provided, that the lease shall not include any cabins or dwelling-houses which may be situated on the aforesaid premises, the parties of the first part reserving to themselves the right to remove any and all such cabins or dwelling-houses off the said premises which the parties of the second part shall have the right at their option to require.

And it is agreed and understood that the lease shall further cover and include the right to make such additions, alterations or modifications, to or in said sugar-house, as the parties of the second part may desire to make, using, at their option, all the brick and other material now on the aforesaid premises, the right being further reserved to the said parties of the second part to drain the aforesaid leased premises into the regular plantation ditches and drains.

But the parties of the second part hereby covenant and bind themselves to make, at least, and, in any event, such additions and alterations to and in said sugar-house, as will enable it conveniently and in suitable time to take off the crops of the Barbreck, St. Peter's and Anchorage plantations.

Article second.

The consideration of the aforesaid lease shall be the sum of twenty thousand dollars ($20,000), or two thousand dollars ($2,000) per annum, which the parties of the second part bind and obligate themselves to pay in semi-annual instalments of one thousand
3 dollars ($1,000) each, the first instalment to be due and payable on the first day of January, 1893, and the others every six months thereafter.

And it is understood and agreed that while all the terms and stipulations of this contract shall be absolutely and irrevocably binding from the date of its execution, the rent, as above stipulated, shall not begin to run until the first day of October, 1892.

Article third.

It is further understood and agreed that there shall be built immediately, or as soon as practicable after the execution hereof, a tramway and bridge from the Barbreck sugar-house through the St. Peter's plantation, on the Barbreck side of the bayou, to the boundary line of the Prosser plantation, for the purpose of conveying the crops of the said plantation to the sugar-house.

The parties of the first part contract and agree, on their part to grade the beds of the said tramways and to haul all the necessary materials for their construction, the parties of the second part covenanting and agreeing on their part to furnish all the material and to complete the tramways and build the bridges, after the grading and hauling aforesaid shall have been done.

And, after the first crop season after the execution hereof, the parties of the second part bind and obligate themselves to build, on the same terms and conditions as are provided above, a branch tramway from the main tramway on the Barbreck plantation, hereinabove provided for, across the St. Peter's bridge and through the St. Peter's field on that side of the bayou up to the line of the Morgan railroad. And the parties of the second part shall have the privilege of carrying the tramways entirely through all or either of the said three plantations, so as to be able to extend them beyond.

Article fourth.

The parties of the second part shall further have the right of way for a railroad to connect the Barbreck sugar-house with the Morgan railroad, including the consent of the parties of the first part to their building a railroad bridge across the bayou at the grade level of the Barbreck cane yard, and the further right to construct and operate telegraph and telephone lines along all the aforesaid tramways and railroad.

The parties of the second part shall further have, during the lease, a full and complete right of way over the road connecting the Barbreck sugar-house and the railroad depot, and the further right to establish and operate during the lease at some suitable place on one of the three aforesaid plantations a kiln for burning brick.

Article fifth.

But it is distinctly understood and agreed that the aforesaid tramways and railroad must be so constructed as not to interfere with the drainage facilities of the aforesaid three plantations or either of them.

And as the courses of the aforesaid tramways and railroad are not definitely fixed herein, it is further understood and agreed that as soon as the said courses shall have been mutually agreed upon and the tramways and railroad built, they shall *ipso facto* become the courses contemplated herein, and neither of the parties hereto shall have the right to change the same, or either of them, without the other's consent.

Article sixth.

The parties of the first and second part hereto further covenant and agree mutually to sell and purchase respectively upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, viz: the Barbreck, St. Peter's and Anchorage plantations, except such as may be needed each season as seed for the following year.

4

Article seventh.

The parties of the first part shall cultivate the plantations in case, or so much thereof as would be justified by usual and improved agricultural methods.

Article eighth.

The cane shall be delivered at the sugar-house or at the tramways, at the option of the parties of the first part, to cars furnished by the parties of the second part, the said cars to be loaded to their full capacity by the parties of the first part.

Article ninth.

The parties of the first part shall have the absolute right to deliver, on and after the fifteenth day of October of each season, and the parties of the second part shall be bound and obligated to accept, unless hereinafter provided to the contrary, so much cane each working day as shall represent the average amount necessary to be delivered per day, to complete the delivery by the twenty-fifth day of December following, the said average to be based upon the number of working days between the fifteenth of October and the twenty-fifth of December and the total estimated tonnage of the three plantations.

The said estimate shall be made on the first day of each October by the parties of the first part and shall be submitted in writing to the parties of the second part, who shall have the right to make a personal inspection of the crop; and, in case of a disagreement between the parties hereto as to the tonnage, they shall agree upon an umpire, whose decision and estimate shall be final and binding on all parties hereto.

Article tenth.

The parties of the second part shall not be bound to accept cane frozen standing more than eight days after a freeze, but windrowed cane uninjured by freeze shall be paid for on the same basis as uninjured standing cane.

And all cane must be cut as close to the ground as practicable and not above the first red joint; and it must be delivered promptly after cutting, freed from trash, as is customary in Louisiana. Nor shall the parties of the second part be bound to accept any cane the juice of which shall test less than 9 per cent. sucrose.

Article eleventh.

The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane, as expressed at the mill and the average market price as determined by the New Orleans quotations of prime yellow clarified sugar, during each delivery week, plus the bounty, this price to be estimated on a basis of four dollars per ton for cane when the sucrose content of the juice is 11 per cent. and the average

market price of prime yellow clarified sugar plus the bounty is five and a half cents per pound, or 6.6 cents for every one per cent. of sucrose in the juice, thus:

11 per cent. x 6.6 x $5\frac{1}{2}$, equals $4.00.

Article twelfth.

The parties of the first part shall have the right to appoint a representative, who shall have access to the mill at all times, for the purpose of testing the juice or for any other purpose, legitimately and reasonably pertaining to the interests of the said parties of the first part under this contract.

The juice shall be tested daily or as often as either party may desire, and immediately or as soon as practicable after it is expressed. And in case more than one determination is made during a day, the average result shall be taken as the basis of payment for that day. And in case of disagreement between the parties hereto as to the percentage of sucrose content, Dr. W. C. Stubbs, of New Orleans, shall be the umpire, and his decision and figures shall be binding.

Article thirteenth.

The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid.

Article fourteenth.

But, whereas, there is recorded against the premises hereinabove leased, a mortgage to secure the payment, at maturity, of four promissory notes, each note being for the sum of four thousand one hundred and sixty-six dollars and sixty-six cents and bearing interest at the rate of four per cent. per annum from the first day of January, 1890, until they respectively mature; and

Whereas, the said notes mature on the first of January, 1893, the first of January, 1894, the first of January, 1895, and the first of January, 1896, respectively:

Now, therefore, in order to secure the parties of the second part in the quiet enjoyment of the said leased premises and the prompt payment of the said notes, principal and interest, as they respectively mature;

It is understood and agreed that the parties of the second part shall have the right and privilege of reserving each season until all the aforesaid notes shall have been paid, the rent which may be due under the terms of this contract on the first day of January of

each season, and, in addition, so many of the cash weekly payments for cane, hereinabove provided for, next preceding the first day of January of the said season, as will, together with the rent as aforesaid, aggregate the amount, principal and interest, of the note falling due on the first of January of that season.

The amount so reserved shall be held by the said parties of the second part in trust for the parties of the first part, and in case the said note is not promptly paid at maturity by the parties of the first part, then, for their own protection, the parties of the second part shall have the right to apply the amount reserved as above provided, to the payment of the note, principal and interest, charging the amount so applied to the account of the parties of the first part.

But, if the parties of the first part shall promptly pay at maturity the note falling due on the first of January of any season then in that event the amount reserved, as above provided, by the parties of the second part for the payment of that note, shall immediately become due and payable to the parties of the first part.

The parties of the first part further covenant and agree to remove all other liens and privileges on the leased premises and to keep the same free from all other liens and privileges during the term of this lease.

6

Article fifteenth.

In the event of a temporary closing and shutting down of the mill, as the result of fire, explosion, breakage or other purely fortuitous cause, the parties of the second part shall not be bound to receive cane during such time and shall not be liable in damages to the parties of the first part for such non-receipt, but during such temporary shutting down of the mill, the parties of the first part shall have the right to dispose of so much cane, as the parties of the second part would otherwise have been compelled, under the terms of this contract, to receive, in any way they may see fit and they shall furthermore have the right to use for such purpose, free of charge, all the tramways, cars and other transportation facilities of the parties of the second part.

And the parties of the second part stipulate and agree to use every reasonable effort to repair and make all such delays as short as possible.

Article sixteenth.

In case of total loss of the sugar-house, mill and machinery, by fire or otherwise, this contract may be terminated, at the option of the parties of the second part.

Article seventeenth.

It is agreed and understood that the value of the Barbreck sugar-house machinery and appurtenances, as they stand at the date of this contract, shall be estimated by three appraisers to be appointed as follows: One by each of the parties hereto, and the third by these two.

And the parties of the second part covenant and agree to take out thereon, in the name and for the benefit of the parties of the first part, and to keep in force during the term of this contract, a policy of insurance against fire, for the full value as above determined, provided, that this valuation shall not exceed the sum of ten thousand dollars, and to pay the premium on the said policy for the benefit of the parties of the first part, during the term of this contract.

Article eighteenth.

The parties of the second part further covenant and agree to pay during the term of this contract any and all extra taxes which may result from increased assessment of the leased property on account of the improvements put upon it by the said parties of the second part.

Article nineteenth.

On the termination of this contract, by limitation or as otherwise provided therein, the parties of the second part shall have the right to remove and take away all the improvements, of whatever kind or description, including tramways, which they may have put upon the leased premises, on condition, however, of paying, before such removal, to the parties of the first part an amount which shall represent the depreciation in value of the sugar-house, machinery and appurtenances belonging to the said parties, as a means of manufacturing sugar from cane, the present value to be that determined by the appraisement hereinabove provided for, and the value at the termination of this contract to be determined by a similar appraisement, it being understood and agreed that the latter appraisement shall be made solely with reference to the relative efficiency and value of the said sugar-house, machinery and appurtenances for the manufacture of sugar from cane, without regard to the profits of the industry or the depreciation in value of as the result of the introduction of new and improved machinery or methods of manufacture.

7 Article twentieth.

The parties of the first part agree to keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights.

Article twenty-first.

Nothing in this contract shall be construed as to authorize the establishment or conduct of a store of any sort or description upon the leased premises, by the parties of the second part or others.

Article twenty-second.

It is further mutually understood and agreed that in case the bounty now paid upon sugar by the United States Government is

removed during the term of this contract, then, and in that event, either of the parties hereto may at their option terminate the contract, but as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned, the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated upon the same terms and conditions, except as hereinabove provided.

Article twenty-third.

And whereas, the parties hereto recognize that despite the genuine and earnest efforts of the parties of the second part to construct and put in operation the contemplated mill in time for the next grinding season, after the execution hereof, such a consummation may be rendered practically impossible by events absolutely beyond the control of the said parties hereto, it is therefore understood and agreed that if by reason of such unforeseen events it shall become practically impossible to construct and put into operation the said contemplated mill in time for the next grinding season after the execution hereof, then, and in that event the said parties of the second part shall be bound to receive under the terms and conditions of this contract, during said next grinding season, only the cane grown on the Barbreck plantation, and the parties of the first part shall have the right to dispose of the St. Peter's and Anchorage crops during said season, in any way they may see fit with the privilege of using for such purpose, free of charge any and all the transportation facilities of the parties of the second part.

But nothing in this section shall be so construed as to relieve the parties of the second part from their obligation under this contract to purchase the crops of the three aforesaid plantations in case of their failure to construct and put in operation the said contemplated mill in time for the next grinding season, if such failure shall result from the financial inability of the said parties of the second part to meet their engagements or from a want of exercise by them of all due caution, prudence and foresight to that end.

Article twenty-fourth.

It is further understood and agreed that the parties of the second part shall have the right and privilege of subrogating to their rights and liabilities under this contract at any time during the term thereof a corporation duly organized, provided, it be satisfactorily shown that the said corporation be legally organized and competent to contract, that it is the absolute owner and proprietor of the property, machinery, rights and effects of every kind and description which shall have belonged to the parties of the second part
8 hereto and shall be situated upon the three aforesaid plantations or either of them, and that the said property, machinery, rights and effects are free from any and all liens and encumbrances

except the lien of the lessors under this contract, and on this condition, the parties of the first part covenant and bind themselves to accept the aforesaid corporation as the substitute of the parties of the second part hereto and to release the said parties from any and all subsequent liability hereunder.

Article twenty-fifth.

It is finally understood and agreed that this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other.

In witness whereof, the aforesaid parties have hereunto affixed their hands on this 16th day of June, 1892.

(Signed) H. M. PAYNE.
J. U. PAYNE.
J. U. PAYNE & CO.

(Signed) L. MURRAY FERRIS.
WM. L. FERRIS.

3. Under article twenty-four (24) of said contract, the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities, under said contract, to the Ferris Sugar Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

4. The McKinley tariff act, passed October 1st, 1890, which provided for a bounty to sugar-producers, was repealed on August 28th, 1894, and on September 3rd, 1894, it was stipulated between the parties to said contract that the provisions of articles eleven and thirteen thereof should be extended so as to apply to any bounty that might thereafter be granted by Congress to sugars produced from the crop 1894.

5. The Ferris Sugar Manufacturing Company, Limited, operated the Barbreck sugar-house under the terms of said contract from October, 1894, to January 4, 1895, and the said parties of the first part, J. U. Payne & Company *et als.*, delivered to the said Ferris Sugar Manufacturing Company during that season, under said contract, ten thousand three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purshase price of four thousand five hundred and sixty-four and $\frac{73}{100}$ dollars ($4,564.73) on the contract basis of $2.75 a ton, and a further sum of six thousand five hundred and seventy-nine
9 and $\frac{30}{100}$ dollars ($6,579.30) in the event that the bounty should be collected.

6. In the fall of 1894 the Ferris Sugar Manufacturing Company, Limited, became heavily involved in financial difficulties, and prior to this a number of creditors, among them the Reading Iron Works Company and John H. Murphy, recorded vendors' privileges upon machinery sold by them to the said Ferris Sugar Manufacturing Company, Limited, and erected by it in the said Barbreck sugar-house.

7. On January 4th, 1895, the Burdon Central Sugar Refining Company, Limited, a corporation organized under the laws of New York and an unsecured creditor of the Ferris Company to the extent of forty thousand four hundred and four and seventy-four one-hundred- dollars ($40,404.74), its entire debt, filed a bill in equity in the circuit court of the United States for the eastern district of Louisiana, alleging that the Ferris Sugar Manufacturing Company, Limited, was heavily indebted and insolvent, and that its assets would be sacrificed by numerous creditors who were about to bring suit. The bill prayed for the appointment of a receiver to take charge of all the assets of said company. On the same day the defendant company filed an answer, with a resolution of its board of directors annexed authorizing such action, admitting all the facts charged in the bill, and uniting in the prayer for a receiver. A receiver was thereupon appointed.

8. On March 25th, 1895, H. M. Payne, J. U. Payne, and J. U. Payne & Company filed a petition of intervention in this suit, stating, among other things not relevant to this certificate, the said balance of $4,564.73 and of $6,579.30, due them for cane delivered to the said Ferris Sugar Manufacturing Company, Limited, and claiming that both sums were secured by a lessor's privilege on the property of the defendant company at the Barbreck sugar-house, and that the latter sum, namely, $6,579.30, was also secured by an equitable lien on any bounty that might thereafter be collected by the receiver. The receiver and the Ferris Company filed an answer to this petition, admitting the correctness of the amounts
10 claimed, but denying that they were secured as averred.

The Burdon Central Sugar Refining Company adopted the answer of the receiver. Issue was joined by replication and the matters in issue were referred to a master to report upon the law and the facts. The master allowed the amounts claimed by interveners, but rejected their claims both to a lessor's privilege to secure these amounts and to an equitable lien on the bounty. Upon exceptions to the master's report the court decreed that interveners were entitled to a lessor's privilege upon the movable effects of said Ferris Company and of third persons upon leased premises to secure both said sums due for the unpaid price of the sugar-cane, in addition to an equitable lien on the bounty to secure the said sum of $6,579.30, in preference to all other creditors of the said Ferris Sugar Manufacturing Company, Limited.

9. From this decree The Burdon Central Sugar Refining Company, complainants, the Reading Iron Company and John H. Murphy, interveners in this suit, as creditors of the Ferris Sugar Manufacturing Company, Limited, for large amounts, took an appeal and made the following assignment of errors:

First. Said court erred in decreeing that said interveners, J. U. Payne *et al.*, are entitled to a privilege and right of pledge as lessors upon the movable effects of the defendant on the leased premises to secure the sums due said interveners for cane sold and delivered by them to said defendant amounting to $4,564.73 and $6,579.30.

Second. Said court erred in decreeing that said interveners are

entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said interveners and taken off by the defendant or its receiver.

The case having been argued in this court on the errors assigned, and this court desiring the instructions of the honorable the Supreme Court of the United States for the proper decision of the ques-
11 tions arising under said assignment of errors, it is hereby ordered that the following propositions and questions of law be certified to said Supreme Court, in accordance with the provisions of section six of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the circuit courts of the United States, and for other purposes," approved March 3rd, 1891, viz:

First.

It being shown that the cane sold by appellees, J. U. Payne & Company *et als.*, to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered, in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?

Second.

Under the terms of the 13th article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar-cane sold and delivered under said contract, have the appellees, H. M. Payne, J. U. Payne, and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit?

Third.

If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?

The clerk will transmit with this certificate one copy of the printed record and of each brief filed in the cause.

12 United States Circuit Court of Appeals, Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing eleven pages contain a true and perfect transcript of the statement and questions of law certified to the Supreme Court of the United States by said United States circuit court of appeals on the 25th day of February, 1897, in the case of The Burdon Central Sugar Refining Company

et als., appellants, *v.* Jacob U. Payne *et als.*, appellees, No. 518, as the same now remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 27th day of February, A. D. 1897.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,501. U. S. circuit court of appeals, 5th circuit. Term No., 722. The Burdon Central Sugar Refining Company *et al.*, appellants, *vs.* Jacob U. Payne *et al.* (Certificate.) Filed March 2d, 1897.

167-127

167-127

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896. NO. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL.

versus

JACOB U. PAYNE ET AL.

Office Supreme Court, U. S.
FILED.
MAR 9 1897
JAMES H. McKENNEY,
CLERK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

And now come the Burdon Central Sugar Refining Company, John H. Murphy and the Reading Iron Company, appellants, by their respective undersigned solicitors; also J. U. Payne, J. U. Payne & Co., and Henry M. Payne, appellees, by their undersigned solicitors, and suggesting that this case comes here upon questions certified by the United States Circuit Court of Appeals for the Fifth Circuit, involving propositions of law, concerning which it desires the instructions of this court for their proper decision, under the provisions of Sec. 6 of the Act of March 3, 1891; that the action of said Circuit Court of Appeals in this case has been suspended, and will so remain, pending the answers to said questions, and that the said appellant, the Burdon Central Sugar Refining Company, as well as the Ferris Sugar Manufacturing Company, Limited, are both insolvent and in the hands of receivers,

and that the final liquidation of both of said corporations is delayed only by the pendency of this suit:

They move that this cause be advanced and assigned for argument, during the present term of this Court, or, if no day can be had for argument, that they be permitted to submit the same upon brief at an early date during this term, to be fixed by the Court.

Respectfully submitted,

J. D. ROUSE,
WILLIAM GRANT,
T. M. MILLER,
Solicitors for Appellants.

CHARLES E. FENNER,
Solicitor for Appellees.

Supreme Court, U. S.
FILED
APR 8 1897
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896. No. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL.

versus

JACOB U. PAYNE ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of J. D. Rouse and William Grant, of Counsel for Appellants.

J. D. ROUSE,
WM. GRANT,
Solicitors for the Burdon Co., Appellant.

L. GRAHAM & SON, LTD., 207-211 BARONNE ST., NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896. No. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL.

versus

JACOB U. PAYNE ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of J. D. Rouse and William Grant, of Counsel for Appellants.

This case comes here for the determination of questions of law, propounded and certified by said Circuit Court of Appeals, under the provisions of the 6th section of the act of March 3, 1891.

The facts out of which these questions arose are fairly stated in the certificate (R., p. 1, *et seq*)., which is here adopted and referred to. We will consider the same in their order. The following is the

FIRST QUESTION.

"It being shown that the cane sold by appellees, J. U. Payne & Co. et als., to the Ferris Manufacturing Com-

pany, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited; are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?"

The facts stated show that the Ferris Company were lessees of the sugar house of Payne & Co., but not of the plantations upon which the cane sold by them to said company was grown. But because the instrument evidencing the contractual relations of the parties contained, not only a contract of lease, but one for the sale and delivery of cane by them to the lessees, Payne & Co. contend that the payment of the price thereof is one of the obligations of the lease, and therefore secured by the lessor's privilege. This is denied by the appellees. The Civil Code of Louisiana provides as follows:

"Article 1762. The contract must not be confounded with the instrument in writing by which it is witnessed. The contract may subsist, although the written act may, for some defect, be declared void; and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law."

Wherever a clause in a written instrument forms a complete obligation or contract in itself, it may be considered independently and apart from its context, or the entire instrument. Friedler vs. Chotard, 36 La. An. 276.

It was contended that because the twenty-fifth article of the contract (R., p. 9) declares that "this is an entire contract, each stipulation and obligation being a part of the consideration for every other," all the obligations are considerations of the lease, and, therefore, obligations thereof for the performance of which the lessor has a privilege. No person can determine the character of a contract by giving it a name. The character of a contract must be determined by the object of it.

Bynum vs. Armstrong, 6 Martin, N. S., 161.

If it be a contract for the hire of labor, skill, or industry, and is called by the parties a lease, its character is not changed by its designation. The Legislature of Louisiana authorized the *lease* of the New Canal, it being the property of the State. In pursuance of the act, a contract of lease *eo nomine* was entered into with General Taylor. The right of the lessee in a contract of lease, in Louisiana, is subject to seizure and sale under execution. A judgment creditor of Taylor seized his rights as lessee of said New Canal. The sale was enjoined and the injunction maintained upon the ground that his contract was not that of lease, but was a contract for the hire of labor, and therefore not subject to seizure.

Case vs. Taylor, 23 An. 497.

"The motive of a contract does not change its nature; the contract may be a sale, though the motive be to secure a debt."

Peet vs. Morgan, 6 Martin, N. S., 583.

Williams et als. vs. Sch. St. Stephens, 1 Martin, N. S., 417.

It was also contended that the contract for the sale and purchase of cane was a consideration for the lease—that is to say, the motive for making it. But it does not follow that, because a contract for the sale of cane was the motive for making the contract of lease, the former contract is one of the obligations of the lease.

If there were no other consideration for the lease, it might be fairly held to be the motive therefor. But the rent to be paid is the prime consideration for a lease, and, if other considerations moved its execution, they did not become obligations thereof.

If this Court shall find that the contract for the sale and purchase of cane is not a part of the contract of lease, it will be unnecessary to consider what are the obligations of a lease secured by the lessor's privilege. Otherwise, the nature of these obligations will appear from the following exposition:

The Louisiana Civil Code contains the following provisions:

Art. 2705. "The lessor has, for the payment of his rent

and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased."

The Code Napoleon, Art. 2102, speaks of the lessor's privilege under the title of "Privileges on Certain Movables." Our Code, under the same title, grants a privilege for the "rents of immovables" (C. C., Art. 3217). The French Code, after enumerating certain debts as privileged, says, "the same privilege is attached to debts for tenantable repairs, and for everything which concerns the execution of the lease," *(pour les réparations locatives et pour tout ce qui concerne l'execution du bail)* C. N. 2102.

The Louisiana Code further provides in Art. 3218, "that the right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege," and that he "may take the effects themselves and retain them until he is paid."

What is meant by "other obligations of the lease" found in C. C., Art. 2705? Every obligation which might be found in the contract of lease evidently was not intended. The French authorities show that an independent loan not intended for the exploitation of the property leased, though mentioned in the contract of lease, is not secured by the lessor's privilege (10 P. Pont. (Marcadé) No. 125; 3 Delvincourt, Cours de Civil Code, 273).

We must then look for the obligations of the lease, referred to in our Code, to some other source than the contract of lease, which besides the lease may contain many other stipulations having no relation to the lease. The French Code confers the privilege in express terms on the lessor for tenantable repairs *(les réparations locatives)*.

That phrase is not found in our Code. The words "other obligations of the lease" were evidently intended to cover those obligations imposed by the Code on the lessee, in the absence of contrary stipulations. These obligations are defined in Sec. 3 of the Title of Lease, Arts. 2710 to 2726.

Why did the jurists of 1825, who drafted our Code, depart

from the language of the French Code when they framed Art. 2705? They used neither the words "*réparations locatives*," nor "*pour tout ce qui concerne l'execution du bail.*"

They substituted "other obligations of the lease," showing an intent to confine the privilege to obligations imposed by law on the lessee, unless the agreement for the lease reduced, or changed those obligations. Our Code defines the obligations resulting from a lease and distributes them between the lessor and lessee, and every lease imposes those obligations on the lessor and lessee respectively, unless they be shifted or dispensed with altogether by agreement.

It is evident that the framers of our Code intended to avoid the general language used in the Code Napoleon, because it might be difficult to determine what "concerned the execution of the lease;" and instead of confining the privilege to *réparations locatives* (tenantable repairs), they intended to cover all the other obligations of the lease as defined in the Code, and which by the operation of law are incorporated in the lease, unless these obligations are shifted or dispensed with by express agreement. This was the view of Domat, who says: "The lessor is entitled to the privilege to secure him, not only for the rents, but *des autres suites du bail;* as, for instance, deteriorations which have been caused by the fault of the tenant, all the expense, damage and interest which he owes by reason of the lease."

Domat, Vol. 3, p. 432.

Our Legislature designedly abstained from using the language of the French Code to avoid the difficulties which had arisen as to the interpretation of its Art. 2102.

Laurent (Vol. 23, Nos. 407–408), as well as other writers, indicate a difference of opinion as to the construction of the words, "everything which concerns the execution of the lease." In No. 407 Laurent adopts our interpretation of the words, "other obligations of the lease." He says these obligations are written in the Code, but "what concerns the execution of the lease" includes all the obligations imposed by law, or by the contract on the tenant, and hence the advances made by the lessor to the tenant for the exploita-

ation of the property, or the running of a leased mill are adjudged to be covered by the lessor's privilege. The extent to which the French courts have carried the lessor's privilege is mentioned with disapproval by Laurent (No. 409, Vol. 29).

The Louisiana courts have never extended the privilege of the lessor to any other obligations of the lease than those arising from the operation of law and stipulations incidental to the contract of lease itself. The cases cited by the appellees do not support their contention In the case of Warfield et al. vs. Oliver, 23 An. 612, there was a stipulation in the instrument of lease that the lessee should put and keep the leased premises in repair. Putting the premises in repair would otherwise have been an obligation of the lessor. C. C., Art. 2693.

In Fox et al. vs. McKee, 31 An. 67, and Henderson et als. vs. Meyer & Bro., 45 An. 795, the attorney's fees were stipulated by the tenant in case of suit for the recovery of the rent. This was merely incidental to the agreement to pay the rent and followed the failure as interest follows non-payment when due. The cases cited do not extend the obligations of the lease beyond the plain terms thereof or those established by law.

The first question should, therefore, be answered in the negative.

SECOND QUESTION.

"Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar cane sold and delivered under said contract, have the appellees, H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Co., an equitable lien upon the bounty money collected from the United States by the receiver in this suit?"

The contract was made in Louisiana, there to be executed, and must be construed in accordance with the laws thereof.

In Louisiana liens and privileges for the security of a debt exist only when established by statute law. Our Code provides, upon this subject, as follows:

"Article 3184. Lawful causes of preference are privilege and mortgages."

"Article 3185. Privilege can be claimed only for those debts to which it is expressly granted in this Code."

Privileges are *stricti juris*. They can not be extended by implication or analogy. *Privilegia sunt strictissimæ interpretationis.*

Guion Beck et al. vs. Brown, 6 La. An. 112.
Cook vs. Dodge, 6 La. An. 276.
Cochran & Co. vs. Walker, 10 La. An. 431.
Hoffman vs. Laurans et al., 18 La. R. 70.
Grant vs. Fiol et al., 17 La. R. 158.
2 Hennen's Digest, 1238, No. 3.

A privilege can not be created by convention between the parties; it must derive its existence from the nature of the contract, and from the law applicable thereto.

Citizens Bank vs. Moreau et al., 37 La. An. 861.
State vs. Citizens Bank, 33 La. An. 705.
Landry vs. Blanchard, 16 La. An. 173.
Shaw vs. Grant, 13 La. An. 52.

Equitable liens, either express or implied, have never been recognized in Louisiana, as our law is solely statutory and all liens and privileges must be founded upon statute.

Equitable liens, which are recognized and enforced in the common law States arise out of an entirely different system of law. At common law, liens and privileges arise from custom or usage, such as the lien of the artisan upon the thing which he has repaired; the lien of the attorney upon the judgment which he has recovered; that of the inn-keeper on the property of the traveler; that of the carrier upon the goods transported by him, etc.

In Louisiana all such liens are established by statute (C. C., Art. 3217; Revised Statutes 1870, Sec. 128 and 2872 to 2907.

In the common law States, courts of equity, in the absence of any prohibitory legislation, have extended the principle to analogous cases where the lien has not yet been established

by custom ripened into law. We have been unable to find any case, nor do we believe that any can be found, where an equitable lien has been recognized in opposition to statute law, defining specifically in what cases only a lien shall exist. The principle that courts of equity will not grant relief of an equitable nature contrary to the public policy of the State, as expressed in a statute, is established in the case of Teal vs. Walker, 111 U. S. 242, and in Thompson vs. Shirley, 69 F. R. 484.

The cases cited refute the contention of the appellees, that notwithstanding the positive provisions of the Louisiana statute (Civil Code, Art. 3185, *supra*) to the contrary, a lien and privilege should be accorded to them, contrary to the public policy of the State, as declared in its legislation.

The case of Wheeler vs. Insurance Co., 101 U. S. 439, arose out of a mortgage providing for insurance as an additional security. So far as the decision recognized an equitable lien of the mortgagee upon the money due under the policy, it was expressly put upon the principles obtaining in the common law States. No such question arose or was decided in the cases cited in support of such doctrine in Louisiana, nor can any be found tending to such a conclusion. It does not appear that the provisions of the statute law of Louisiana was brought to the attention of this Court. If they had been the decision would undoubtedly have been different.

The argument of the solicitor for the appellees is based upon two fundamental errors. One is that courts of equity can create a right where it does not exist at law; and the other is that courts of equity may give relief against a statute. The doctrine that courts of equity could create a right, which was sanctioned by some of the earlier decisions, and ancient text writers, has long been exploded; and that their jurisdiction can be exercised only for the purpose of affording a remedy where the right exists, and Courts of law furnish no adequate remedy, is now the settled law. Mr. Justice Story, in his work on "Equity Jurisprudence," recites the power anciently claimed by courts of equity, to create rights not existing at law, and shows that they have jurisdiction now

only in cases of rights recognized and protected by municipal jurisprudence (Sec. 33). That the Courts of the United States will not exercise their jurisdiction as courts of equity, except where an existing right requires a remedy, when the law affords none, is manifest from all the decisions. Thus, it has been held that State statutes can not affect the equitable jurisdiction of the United States courts *so long as the equitable rights themselves remain.*

Broderick's Will, 21 Wall. 520.

Holland vs. Challen, 110 U. S. Rep. 15.

If rights are enlarged by State statutes, the equitable jurisdiction of the United States courts will be exercised accordingly. If they are taken away by the statute there is nothing left for the courts to exercise their jurisdiction over, and where the chancery courts of a State would grant no relief, the United States courts will grant none.

Ewing vs. City of St. Louis, 5 Wall. 413.

Nichols vs. Levy, 5 Wall. 433.

The case of Meade vs. Beale, in Taney's Circuit Court Decisions, page 339, contains a most lucid exposition of the duty of the courts of the United States to follow in equity cases the laws of the State in which they sit. The opinion is by Chief Justice Taney, whose decisions upon the circuit were never reversed. He there said:

"The Circuit Courts of the United States administer the laws of the State in which they sit, unless these laws are in conflict with the Constitution of the United States, treaties, or acts of Congress; and, as a general rule, regard the decisions of the highest judicial tribunals of the State as conclusive evidence of the law. We do not speak of matters of practice, or of the forms of proceedings, but of decisions upon the right or claim in dispute between the parties, where that right depends upon the laws of the particular State. * * * So, too, as relates to the jurisdiction of the Circuit Court sitting as a Court of Chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the Courts of Chancery

of the United States is, under the Constitution, to be regulated by the law of the English Chancery—that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy and not to the right; and it does not follow that every right given by the English law, and which, at the time the Constitution was adopted, might have been enforced in the Court of Chancery, can also be enforced in a court of the United States; the right must be given by the law of the State, or of the United States. It is the form of remedy for which the Constitution provides; and if a complainant has no right, the Circuit Court, sitting as a Court of Chancery, has nothing to remedy in any form of proceeding."

Having determined that the question involved in the case depended upon the law of the State, and that the bequest under consideration was void in Maryland, where the Court was sitting, he further said:

"This Court is bound to respect this as the law of the State, and if there is no right vested in the complainants by this bequest, this Court can not create one. There is, therefore, neither an equitable nor a legal title, upon which the powers of a court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants."

The learned Chief Justice followed the case of Wheeler vs. Smith, 9 Howard, 55, where the same rule is laid down.

As a court of equity can not create a right where none exists, neither can it give relief against the provisions of a statute. This rule is laid down in Fonblanque's Equity, Book 1, Chapter 1, Sec. 3, where it is said:

"But if the law has determined the matter, with all its circumstances, equity can not intermeddle; and for a chancellor to relieve against the express provisions of an act of Parliament, would be the same as to repeal it. Equity, therefore, will not interpose in such cases, notwithstanding

accident or unavoidable necessity; so that infants had been bound by the Statute of Limitations, if there had been no exception in the act" (p. 69).

See the notes to the text for an interesting discussion of this subject.

This rule was followed by the Supreme Court of Illinois in Stern et al. vs. Gardner, 20 Ill. 304, where the Court said:

"We do not know any power existing in a court of equity to dispense with the plain requirements of a statute. It has always been disclaimed, and the real or supposed hardship of no case can justify a court in so doing. When the State has prescribed a plain rule free from doubt and ambiguity, it is as well usurpation in a court of equity, as in a court of law, to adjudge against it, and for a court of equity to relieve against its provisions, is the same as to repeal it."

But if we are in error in our contention above, and this Court shall hold that an equitable lien can be created by a court of equity in opposition to the law of the State, the appellees will fare no better, because the facts of this case do not bring it within that class of cases where equitable liens will be established and given effect.

The effort here was to subject the bounty to be received from the government of the United States to a lien, or right of pledge when it came into the hands of the debtor, or its receiver.

In Delogny vs. Creditors, 48 La. An. 488, the debtor undertook to pledge the bounty which she expected to receive from the government, and bound herself to pay it to her creditor immediately after the receipt of the amount, "just as if the bounty had been a portion of the proceeds of the crops of the plantation." And the Court said: "The bounty was not delivered at the time the attempt was made to pledge it as an additional security for the debt. It was collected from the government by a syndic some time after the act of mortgage had been executed. It is hardly necessary to cite authority in support of the proposition that delivery is an essential in order to secure a pledge (save in statutory pledges; not the case here). The bounty was not a portion of the proceeds of

the crop; it was no part of the crop. We know of no principle of interpretation under which it is possible to hold that the bounty was delivered as required, and came within the provisions of the statutes relative to pledge as a security."

The claim to an equitable lien upon the bounty in this case is based upon Art. 13 of the contract (R., p. 5), viz.:

"Art. 13. The price of cane, as above determined, shall be as follows: $2.75 per ton shall be paid every Monday for the cane delivered during the preceding week until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part, on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them until the whole of the said balance shall have been paid."

The mode in which the price of cane was to be determined was provided for in Art. 11 (R., p. 4).

The bounty itself did not accrue to Payne & Co., and could not under the law be paid to them, because they were not producers of sugar. We have already shown that the parties could not create a lien and privilege upon the bounty by stipulation. The effect of the stipulation is then nothing more than an agreement on the part of the lessees to pay any balance due on the price of the cane purchased, out of bounty when collected—not alone out of bounty upon sugar produced from cane purchased from Payne & Co., nor on sugar necessarily produced from any of it, as the first bounty payments might be for the production of sugar from cane purchased from other parties. So it amounts to no more than a promise to pay a debt out of a fund not then in existence, but which might be afterward created. As a matter of fact, when the cane of the intervenors was purchased and sugar made therefrom, there was no law granting any bounty for the production of sugar. The original bounty act had been repealed (August 28, 1894), and it was not until the 2d day of March,

1895, that any bounty was provided for the production of sugar in 1894 (28 Statutes at Large, 933).

This Court in Christmas vs. Russell, 14 Wall. 69, said: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifest. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—no authority to collect, or any power of revocation. If he does it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compelled to do so, though forbidden by the assignor."

This was followed in Trist vs. Child, 21 Wall. 441.

The rule on this subject is thus stated in Hare & Wallace's Notes to Leading Cases in Equity, Vol. 2, Part 2, page 233:

"It is necessary, moreover, in order to constitute an assignment, either in law or in equity, that there shall be such an actual or constructive appropriation of the subject matter assigned as to confer a complete and *present* right in the assignee, even when the circumstances do not admit of its immediate exercise. *A covenant on the part of a debtor to apply a particular fund in payment of the debt, as soon as he receives it, will not operate as an assignment*, for it does not give the covenantee a right to the fund, *save through the covenantor*, but looks to a future act on his part, as the means of rendering it effectual."

This case was followed in Christmas' Administrator vs. Griswold, 8 O. St. 559, and Ford vs. Garner, 15 Ind. 301. The leading case in this country is Rogers vs. Hosack, 18 Wend. R. 319, where this question is elaborately discussed. It was followed by this Court in Christmas vs. Russell, and Child vs. Trist, *supra*.

The same rule is laid down by the Supreme Court of Louisiana in Connelly vs. Harrison, 16 An. 41.

The transfer of the control of the fund to the assignee must be absolute.

Dickenson vs. Philips, 1 Barb. 454.

Hoyt vs. Story, 3 Barb. 262.

The intention must be to create a lien upon property, as distinguished from an agreement to apply the proceeds of the sale of it to the payment of a debt.

Jones on Liens, Sec. 32.

It is essential to an equitable lien, that the property charged shall be capable of identification, so that the claimant of the lien may say, with a reasonable degree of certainty, what property it is that is subject to his lien.

Jones on Liens, Sec. 34.

There must be an appropriation of the fund *pro tanto*, either by giving an order on the specific fund, or by transferring the amount otherwise in such a manner that the holder of the fund is authorized to pay the amount directly to the creditor, without the further intervention of the debtor.

Jones on Liens, Sec. 52.

This case does not come within any of these requirements.

There can be no doubt that future property may be assigned and such assignment will give an equitable lien thereon, but an equitable lien can not be created on future property except by an assignment or mortgage.

When a lien is given by stipulation merely it is essential that the thing on which the lien is established shall be *in esse* —it must be capable of enforcement on a particular thing at the time the contract is made.

Jones on Liens, Sec. 29.

Hagan et al. vs. Sompeyrae et al., 3 La. R. 154.

It is true an equitable lien, where the doctrine prevails, may be by stipulation established on specific personal property *in esse*, whether it be a chattel or a particular incorporeal credit, and, therefore, a contract can be enforced which gives a lien on an existing claim in favor of an attorney who agrees to prosecute it.

The contract in this case was executed in 1892, the fund on

which a lien is claimed had no existence then; it could not come into existence until the delivery of cane by the intervenors in 1894, and the contract does not restrict the lien to the bounty on cane delivered by the intervenors, but applies to the bounty on cane delivered by any one.

The only identification of the fund is a fund to be received from the government as bounty on cane ground at Barbreck sugar house.

There are many cases where a future earned fund or property is susceptible of assignment in equity, but we can find none which extends the principle to the establishment of a lien on future-acquired incorporeal rights by a mere contract that the creditor shall have a lien thereon. The rule seems to be positive, in the absence of mortgage or assignment, that the fund on which it is possible to give a lien by mere stipulation must be *in esse* at the time the debtor agrees to give the lien, and the fund must be at that time susceptible of identification.

If the fund or incorporeal right is not *in esse* at the time of the stipulation, it is impossible to affect it with a lien, although it is possible to assign it or to mortgage it.

A mere agreement to appropriate a fund when it comes into existence, or to give a lien thereon, does not operate as a lien; but an assignment or mortgage of such prospective fund is effectual so as to give the assignee or mortgagee an equitable right in the fund when it comes into existence.

This is the distinction between an assignment and an agreement to give a lien or to make an appropriation of a non-existent fund.

If the bounty were an accessory to any property on which the contract gave the intervenors a lien, the case might be different; the bounty is due for sugar produced from cane and may be considered an incident to that cane; but the contract does not provide for a lien on the cane sold, nor on the sugar produced from the cane sold, but for a lien on the bounty money which the company might collect from the government on sugar produced from anybody's cane which was delivered at Barbreck sugar house.

In the case of Ingersoll, 89 N. Y., p. 513, the agreement was to give a lien on claims involved in suits then pending. The claims not only existed, but were sued on. In that case the agreement was that the plaintiffs were to receive the sum recovered and retain out of it their compensation, and to pay the balance, if any, to Heath. The Court regarded such an agreement an assignment, because the whole claim was, in effect, transferred. In this case the intervenors were to receive nothing from the agreement, but the company bound itself to pay out funds received by it. Such an agreement is no assignment. 89 N. Y. 521.

An assignment is a different contract from an agreement to give a lien, and an agreement to give a lien may be construed to operate as an assignment only when the agreement contemplates that the lien holder shall receive money from the debtor and retain a part or all of it in satisfaction of his lien, and if there be any balance to pay it over to the assignor.

Pomeroy says that an equitable lien is strictly analogous to the Roman hypotheca, and was undoubtedly derived from it. Hypotheca was the right given to a creditor over the thing belonging to another, in order to assure the payment of a debt whilst the possession of the property remained in the debtor; Vol. 3, Sec. 1233 (n).

He says also "that it is not correctly termed a trust, though sometimes spoken of as such, because a trust is the existence of *two estates* in the same thing, a legal estate vested in the trustee and an equitable estate held by the beneficiary.

In an equitable lien there is a legal estate with possession held by one person and a special right over the thing held by another. This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing, nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of proceedings directed against the thing which is subject to the lien. Pomeroy, Vol. 3, Sec. 1234 (n).

Jones on Liens says: "A lien is a charge on some particu-

lar thing, as lands, goods or bonds, but a trust may exist with reference to any fund or a mere credit."

Hence a stipulation can not create a lien on a non-existent thing, unless the agreement can be construed to operate as an assignment, as was done in the New York case (89 N. Y. 513).

The bounty, under the act of 1895, is a gratuity, which can not be affected by anterior stipulations. In cases where relief has been granted purely through the generosity of the government, creditors are not entitled to any part of the money, or interest therein, nor is it susceptible of passing by will, or operation of law, as personalty.

Emerson vs. Hall. 13 Peters, 409.

Gillen vs. Gillen, 55 Penn. St. Rep. 430.

Williams vs. Heard, 140 U. S. 541.

Ex parte Weber, L. R. 18 Queen's Bench, Div. 111.

Ex parte Hawker, L. R. 7 Chy. Ap. 214.

In Calder et al. vs. Henderson et al., 2 U. S. Ap. 627, the right of Calder's syndic to recover the bounty upon sugar produced by him was expressly put upon the ground, that the right thereto had become vested in Calder before his cession and therefore was property which passed by his cession to his creditors. At the time the sugar was produced, in this case, there was no law providing for any bounty on its production, and, therefore, no right to the bounty vested upon such production. The subsequent grant of a bounty, therefore, did not vest the intervenors with any right thereto, or to be paid out of the same.

The second question should also be answered in the negative. If so answered, it will not be necessary to consider the

THIRD QUESTION.

"If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company, Limited?"

But, if it becomes necessary to answer this question, the answer must be no. The Louisiana Civil Code contains the following:

"Art. 3183. The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exists among the creditors some lawful causes of preference."

The only "lawful causes of preference" in Louisiana, "are privilege and mortgages," as declared in C. C., Art. 3184.

The Ferris Co. was declared to be insolvent and a receiver therefor appointed January 4, 1895. At that time there was no law providing for the payment of bounty for the production of sugar. It was not until March 2, 1895, that provision was made for the payment of such bounty. When the receiver was appointed no right to any bounty had accrued to the Ferris Company. The rights of all its creditors were fixed by its insolvency, and after that was declared no creditor could gain any advantage over other creditors. Ventress vs. Creditors, 20 La. An. 359.

As shown *supra*, the bounty was a gratuity, and where payable to a natural person would have been exempt from the claims of creditors; but the beneficiary herein being an insolvent corporation it must go to its general creditors.

The Court of Appeals should therefore be instructed to reverse the decree of the Circuit Court, and deny the right of the appellees to the liens and preferences claimed by them. And these appellants so pray.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for the Burdon Co., Appellant.

64-127

164-127

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 722.

Office Supreme Court, U. S.
FILED.
APR 12 1897
JAMES H. McKENNEY,
CLERK.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL., *Appellants*,

versus

JACOB U. PAYNE ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR JOHN H. MURPHY, INTERVENOR AND APPELLANT.

WALTER H. SAUNDERS,
Of Counsel for John H. Murphy, Intervenor and Appellant.

L. GRAHAM & SON, LTD., 207-211 BARONNE ST., NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 722.

THE BURDON CENTRAL SUGAR REFINING COMPANY ET AL., *Appellants*,

versus

JACOB U. PAYNE ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR JOHN H. MURPHY, INTERVENOR AND APPELLANT.

STATEMENT OF THE CASE.

H. M. Payne, J. U. Payne and J. U. Payne & Co. were the owners of three contiguous plantations in St. Landry parish, La., known as Barbreck, St. Peter's and Anchorage, and on June 16, 1892, they entered into a written contract with L. Murray Ferris and Wm. L. Ferris, of Poughkeepsie, New York, in which it was recited that the Messrs. Ferris proposed to lease the sugar house on the Barbreck plantation and to purchase the crops of sugar cane to be grown on the three said plantations by the said owners thereof. This dual purpose was effected by the contract, which is printed in full in the record. Some of the articles of said contract refer to the

lease of the said sugar house, others to the purchase by the Messrs. Ferris of the said sugar cane; and in further recognition of the fact, as shown in the recital, that two distinct contracts—one of lease, the other of sale—were contained in said instrument and contemplated by the parties, the last article, in order to fuse the two contracts into one, provided that said contract was an entire contract, and that each stipulation and obligation therein was a part of the consideration for every other.

The eleventh article of said contract fixed the price of the cane to be delivered thereunder, and the thirteenth article is as follows:

"The price of cane, as above determined, shall be paid as follows: $2.75 per ton shall be paid, every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments *so received by them*, until the whole of the said balance shall have been paid."

Under article twenty-four (24) of said contract the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities under said contract to the Ferris Sugar Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

The McKinley tariff act, passed October 1, 1890, which provided for a bounty to sugar producers, was repealed on August 28, 1894, and on September 3, 1894, it was stipulated between the parties to said contract that the provisions of Arts. 11 and 13 thereof should be extended so as to apply to any bounty that might thereafter be granted by Congress to sugars produced from the crop of 1894.

The Ferris Sugar Manufacturing Company, Limited, operated the Barbreck sugar house under the terms of said contract from October 1894, to January 4, 1895, and the said

parties of the first part, J. U. Payne & Co. et als., sold and delivered to the said Ferris Sugar Manufacturing Company during the season under said contract ten thousand three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purchase price of four thousand five hundred and sixty-four 73-100 dollars ($4564.73), on the contract basis of $2.75 a ton, and a further sum of six thousand five hundred and seventy-nine and 30-100 dollars ($6579.30) in the event that the bounty should be collected.

In the fall of 1894, the Ferris Sugar Manufacturing Company, Limited, became heavily involved in financial difficulties, and prior to this a number of creditors, among them the Reading Iron Company and John H. Murphy, recorded vendor's privileges upon machinery sold by them to the said Ferris Sugar Manufacturing Company, Limited, and erected by it in the said Barbreck sugar house.

On January 4, 1895, upon application of the Burdon Central Sugar Refining Company, Limited, a corporation organized under the laws of New York, and an unsecured creditor of the Ferris Company to the extent of $40,404.74, to the Circuit Court of the United States for the Eastern District of Georgia, the Ferris Company was placed in the hands of a receiver. On March 25, 1895, H. M. Payne, J. U. Payne and J. U. Payne & Co. filed a petition of intervention in this suit, claiming the said balance of $4564.73, and of $6579.30, due them for cane sold and delivered to the said Ferris Company under said contract, and further claiming that both said sums were secured by a lessor's privilege on the property of the said Ferris Company at the said Barbreck sugar house, and that the said latter sum, namely, $6579.30, was also secured by an equitable lien on any bounty that might, thereafter, be collected by the receiver.

The Court decided that the said intervenors were entitled to a lessor's privilege upon the movable effects of the said Ferris Company and of third persons upon the said leased premises to secure both said sums due for the unpaid price

of the sugar cane, in addition to an equitable lien on the bounty which might be collected on sugars made from cane sold by the said intervenors to secure the said sum of $6579.30, in preference to all other creditors of the said Ferris Company.

From this decree the said Burdon Central Sugar Refining Company, complainants, the said Reading Iron Company and John H. Murphy, intervenors in this suit, as creditors of the said Ferris Company for large amounts, took an appeal and made the following assignment of errors:

"1st. Said Court erred in decreeing that said intervenors, J. U. Payne et al., are entitled to a privilege and right of pledge as lessors upon the movable effects of the defendant on the leased premises to secure the sums due said intervenors for cane sold and delivered by them to said defendant, amounting to $4564.73 and $6579.30.

"2d. Said Court erred in decreeing that said intervenors are entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said intervenors and taken off by the defendant, or its receiver."

The case was twice argued in the Circuit Court of Appeals, the latter time upon the request of the Court, and the Court thereupon certified the following questions:

"1. It being shown that the cane sold by appellees, J. U. Payne & Co. et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered, in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?

"2. Under the terms of the 13th article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar cane sold and delivered under said contract, have the appellees, H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Co., an

equitable lien upon the bounty money collected from the United States by the receiver in this suit?

"3. If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?"

FIRST.

The first question is purely one of Louisiana law and involves no Federal question. The contract provides for a ten-year lease of a sugar house and the sale of the sugar cane grown on three plantations by the lessors to the lessees. There is a balance of $11,144.03 due the lessors for cane sold the lessees under this contract, and the lessors are attempting to assert a lessor's privilege for this amount.

Article 2705 of the Revised Civil Code of Louisiana provides, "The lessor has for the payment of his rent and *other obligations of the lease*, a right of pledge on the movable effects of the lessee, which are found on the property leased," and the lessors urge that the agreement in the contract by the lessees to buy said sugar cane is an obligation of the lease, and that the lessor's privilege is enforceable for any unpaid balance on the purchase price of said sugar cane. The question, therefore, is simply whether the lessee's agreement to buy cane is an obligation of the lease; if it is, it is privileged debt, and if not, it is merely an ordinary debt. There is a great similarity, but also marked difference, both in provisions and policy between the Civil Code of Louisiana and the Code Napoleon of France, from which the Louisiana Code is largely derived. Art. 2102 of the French Code grants the lessor's privilege for rent and further provides, "The same privilege takes place for tenantable repairs *and for everything which concerns the execution of the lease.*" With this provision before them the framers of the Louisiana Code of 1825 substituted the expression "other obligations of the lease" for "for

tenantable repairs and for everything which concerns the execution of the lease," and it is fair to infer from this change of language that a change in the construction was intended. Under the French law it has been held that when a master of forges binds himself to furnish to a lessee of his factory the wood necessary to run it, such an advance is privileged, and that the same privilege obtains when a lessor furnishes beets to a lessee of a sugar factory. Laurent, Vol. 29, Sec. 408, and for decision of Court of Appeals of Douai, in reference to the privilege for beets furnished, see Sirey, 1851, 2d Part, p. 77. It will be urged that the French decisions should control in this matter, but it must be remembered that the language of the provisions of the French and Louisiana Code radically differs, and that the policy of the two systems in this respect, as well as in regard to the maintenance of distinctions between the different kinds of contracts, differs still more radically, as we shall hereafter show.

Were the systems identical in every respect, the French authorities are merely persuasive and not conclusive, and should the Court be convinced that they are based upon bad reasoning and unsound public policy, they ought to be discarded.

Article 2063 of the Civil Code of Louisiana, which is not found in the French Code, declares, in effect, that the distinctions between contracts must not be confounded. It is as follows:

ART. 2063 (2058). "A *conjunctive* obligation is one in which the several objects in it are connected by a copulative, *or in any other manner* which shows that all of them are severally comprised in the contract. *This contract creates as many different obligations as there are different objects*, and the debtor when he wishes to discharge himself may force the creditor to receive them separately."

In the case of Case vs. Taylor, 23 An. 497, the Court says: "It matters not what name the parties have given to the instrument, its character is determined by its constituent elements."

There are but three Louisiana cases construing the clause,

"other obligations of the lease." In Warfield vs. Oliver, 23 An. 612, a claim of $5000 damages for the lessee's failure to comply with his obligation to put and keep the leased property in repair was held privileged. The Civil Code of Louisiana provides in a number of articles, 2715, 2716, 2717, 2718, that the lessee shall make certain repairs.

In Fox et al. vs. McKee, 31 An. 67, and in Henderson et al. vs. Meyers & Bro., 45 An. 791, an agreement by the lessee to pay attorney's fees upon the rental in case of suit was held privileged.

These three cases, in all of which the lessor's privilege was enforced in regard to obligations strictly pertinent to the lease, do not sustain the contention that where there are two distinct contracts in one instrument—one of lease, the other of sale—both contracts can be considered contracts of lease, and the obligations of each secured by the extraordinary privileges allowed lessors. Such a construction destroys the distinction between the various contracts, and is opposed to a sound public policy because it enables parties, by the blending of separate contracts in one instrument, to secure privileges for all which the law rigidly confines to one, and it further places third parties at an immense and improper disadvantage.

It is self-evident, and declared by a score of Louisiana decisions, that the extent and nature of all liens and privileges should be accurately defined, and when the judge *a quo*, in his written opinion in this case, said: "In each case, presenting the question, it is for the courts to say whether the stipulation is one which is closely connected with the lease, and whether the object of the stipulation was a cause which operated materially in moving the lessor to consent to the lease. While cases might arise in which the application of this test would be difficult, the case at bar is not one of them," he stated the strongest possible objection to this vague and indefinite extension of the lessor's privilege, flowing from the combination of distinct contracts in one instrument. According to this view, any contract whatever tacked on to a contract of lease, which is an inducement to the contract of lease,

becomes thereby a component part of the contract of lease. If this be the law, all sorts of contracts will be added to a contract of lease for the sole purpose of securing the obligations of the former by the lessor's privilege, and no one could say that this motive did not operate materially in causing the lessor to consent to the lease. Indeed, a virtually fictitious lease might be written into any contract to secure the lessor's privilege for the obligations of the real contract.

Privileges can not be extended by implication or analogy; they are never allowed except when expressly granted by law, and then only by virtue of an exact compliance with the legal requisites essential to their creation and existence. Privileges can not be created by convention between the parties and must derive their existence from the nature of the contract and from the law applicable thereto. *Privilegia sunt strictissimæ interpretationis.*

R. C. C. 3185: "Privilege can be claimed only for those debts to which it is expressly granted in this Code."

Grant vs. Fiol et al., 17 La. 162.
Whatley vs. Austin, Adm., 1 Rob. 22.
Fish vs. Moores, 11 Rob. 280.
The First Municipality vs. Hall, 2 An. 549.
Lee vs. Creditors, 2 An. 602.
Fontenot et al. vs. Soileau, 2 An. 774.
Friend vs. Fenner et al., 2 An. 790.
Shropshire vs. Russell, 2 An. 962.
Stevens et al. vs. Sawyer et al., 3 An. 429.
Harned vs. Churchman et al., 4 An. 313.
Cochran & Co. vs. Walker, 10 An. 431.
Swasey & Co. vs. Steamer Montgomery, 12 An. 800.
Shaw & Co. vs. Grant, 13 An. 52.
Martin vs. Casey, 15 An. 165.
Gause vs. Bullard, 16 An. 107.
Landry vs. Blanchard, 16 An. 173.

This article is not found in the French Code and establishes a policy in regard to the strictness with which privileges are construed radically different from the French policy. It is not found in the Louisiana Code of 1808, but was inserted in the

codification of 1825, and since then the principle, contained in this article, has been repeatedly applied by the Supreme Court in the cases cited.

"If privileges be *stricti juris*, there is still greater reason so to consider them when advanced against innocent third persons." Shaw vs. Grant, 13 An. 52.

"Privileges are *stricti juris*, and as against third persons must be clearly and conclusively established." Rochford vs. Geraghty, 10 An. 429.

In this instant case none of the creditors of the Ferris Company could have supposed that the unpaid balance on the price of sugar cane was secured by a lessor's privilege, and, as to them, this claim certainly has no merit.

The long line of Louisiana decisions, which have just been quoted, explicitly declares the imperative necessity for a strict construction of privileges, and, yet, the lessor's privilege here contended for, is, in the opinion of the judge *a quo*, to be purely a matter of discretion with the Courts upon consideration of the *motives* of the parties in tacking two or more distinct contracts together. Is it not a public misfortune to substitute by construction for the cases in which the Legislature has specifically provided privileges declaring that they must not be extended, the discretion of a court, based upon its views of the motives of parties in combining distinct contracts and will it not breed confusion by disturbing business relations and unsettling the rights of all parties?

We shall now suppose three cases to show the consequences to which, the reasoning of the learned judge *a quo* leads assuming for the sake of the argument, that the joined contracts are the inducements to the lease. Suppose that in this double contract of lease and sale between the Paynes and the Ferris Company, it had been further stipulated, as well it might have been, in view of the fact that the Paynes were sugar brokers in New Orleans, that the Paynes should be the brokers to sell all the sugars manufactured by the Ferris Company during the term of the lease, and that at the time of the failure of the Ferris Company it should have owed the Paynes $10,000, commissions on sales, would

this, too, have been a debt secured by a lessor's privilege, and if not, why not? Surely, it would have been a material inducement to the lease that the Paynes should act as brokers for the sale of all the Ferris Company's sugars, manufactured largely from cane supplied by themselves, and thus make large commissions each year. In contracts advancing money to cotton growers, sugar factories, cotton seed oil factories, etc., the cotton factor or commission merchant always stipulates that he shall handle the crop or product as broker and receive a commission therefor. Here, then, would be three separate contracts in one instrument—lease, sale and mandate—and the obligations of each would be secured by the lessor's privilege.

Again, suppose in said contract of sale, lease and mandate it had been stipulated that a partnership should be formed between the lessors and lessees for the purpose of conducting a commissary on one of the plantations, and this agreement might reasonably have been incorporated in the contract because all sugar growers on a large scale run a commissary in order to reduce the price of their labor as much as possible, and, at the time of the failure of the Ferris Company, there should have been a balance of $5000 found to be due the Paynes upon the final settlement of the partnership accounts, would this debt have been secured by a lessor's privilege?

Here, then, in one instrument are four distinct contracts—sale, lease, mandate and partnership—and the same parties, as lessors, vendors, mandataries and partners, would assert a lessor's privilege for the amount due them in each capacity. The cane sold was not grown upon the leased premises. Suppose the Paynes had contracted to sell the lessees 100,000 tons of cane, each year, in addition to the amount grown by them, and, at the time of the failure there had been a large balance due on the purchase price of this particular cane, would this balance have been a privileged debt?

Instead of privileges being *strictî juris* and carefully prescribed by law for specific cases, one, if not the most valuable and highly prized of them, by virtue of its priority, could

be created by convention of the parties. The law, from strong reasons of public policy enjoined in express codal provisions, must rigidly adhere to a strict construction of privileges and confine them to the exact cases provided for by statute; and we earnestly protest against the destruction of this rule by the establishment of the doctrine that the whim of the parties in the union of other contracts with the contract of lease, and the discretion of courts can extend the lessor's privilege to all the obligations of the joined contracts, thereby substituting the uncertain for the certain and investing the subject of privileges, so carefully guarded by the Code, with the wildest confusion.

Again, the instrument under consideration contains either two distinct contracts, governed by different codal provisions, or one contract, and, if this conglomerate instrument be considered one contract, the question at once arises as to whether it is an entire contract of sale or lease, since it must be the one or the other. In chemistry the union of two elements frequently produces a different substance from either, but the fusion of two distinct contracts can only be accompanied by the absorption of one and the entire loss of its identity—one must be Jonah, the other the whale. Why, when the obligations of the instrument are disputed, should it be viewed as a contract of lease? The only object of such a construction is to secure the advantage of a lessor's privilege against innocent third persons. The sale of the sugar cane was vastly more important to the Paynes than the lease of the sugar house, since the sales each season amounted in value to many times the annual rental, and, therefore, it is far more logical to say that the lease was the inducement to the sale, instead of saying that the sale was the inducement to the lease. The purpose of the lease was to make the sale, not the reverse. The real object of the Paynes was to provide a certain market, each year, for an immense quantity of sugar cane, and they could only effectuate this purpose by leasing a sugar house. The lease was evidently the accessory to the sale and subordinate to it. How is it possible for any court to say that the tenfold more valuable contract was an induce-

ment to the less valuable, and, therefore, a constituent part of it? Common sense would suggest that, if either must be considered the inducement to the other and thereby fused into the other, the less valuable contract would be the inducement. Neither the courts nor the parties can destroy the distinctions between separate contracts by writing them into one instrument, and in this case all the refining in the legal world can not mix into one the immiscible two.

SECOND.

Third Question.

We shall reverse the order of discussion of the second and third questions because it can make no difference whether, according to the general principles of equity jurisprudence, the Paynes have an equitable lien on the bounty money or not, under the thirteenth article of the contract, if such a lien is denied by the statute laws of Louisiana, by which law the Federal Court must be governed in this case. The natural, necessary and primary inquiry is, what is the Louisiana law? We are prepared to show that, even under the general principles of equity jurisprudence, the Paynes have no equitable lien on the bounty money, but we shall now address ourselves to the proposition that an equitable lien, such as is claimed by the Paynes in this case, is forbidden by the laws of Louisiana, and expressly denied by a recent decision of the Supreme Court of Louisiana, and to the further proposition that a Federal Court of Equity must in this case follow the Louisiana statute law, granting for the sake of the argument, that the equitable lien, contended for in this case, is allowed by the general principles of equity jurisprudence.

First.

I.

The Revised Civil Code of Louisiana contains the four following consecutive articles:

Art. 3183 (3150). The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful cause of preference,

Art. 3184 (3151). Lawful causes of preference are privilege and mortgages.

Art. 3185 (3152). Privilege can be claimed only for those debts to which it is expressly granted in this Code.

Art. 3186 (3153). Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.

These four articles follow in logical order. The first announces the principle that there must be a ratable distribution of a debtor's property among his creditors, unless there are lawful causes of preference; the second defines lawful causes of preference to be privilege and mortgage; the third restricts privileges to those debts, to which the Code expressly grants them; the fourth excludes the idea of a conventional privilege. These articles have been repeatedly applied by the courts of Louisiana, in the decisions already quoted, and they are as well established as a uniform interpretation for many years can make them. The following extracts from two decisions, applying Art. 3183, may be given:

"The property of the debtor is the common pledge of his creditors, and the right of the creditors to sell it, and to cause the proceeds to be distributed ratably among them, unless there exist some lawful cause of preference, is a necessary consequence of this principle. Civil Code, Art. 3150 (R. C. C. 3183)." Larthet vs. Hogan et al., 1 An. 330.

"It is urged by the appellants that the property of the debtor is the common pledge of his creditors. C. C. 3150 (R. C. C. 3183). And that privileges are to be allowed only when expressly granted by the Code. *Ib.* 3152 (R. C. C. 3185). The position is correct" * * *

Stevens vs. Sawyer, 3 An. 429; also see Owens vs. Davis, 15 An. 24, and Southern Dry Dock Company vs. Bayou Sara Packet Company, 24 An. 217.

II.

The agreement between J. U. Payne & Co. and the Messrs. Ferris was, in substance, that a future debt of indeterminate amount should operate as a *lien and privilege* on a fund to be thereafter created. There was no assignment of this fund by the debtor to the creditor; there was no attempt nor intention to assign it, either in whole or in part. The creditor was to have a lien or privilege on it, but he was not to own it. The debtor was to earn, represent and collect the bounty, notwithstanding the supposed creation of a lien on it.

That such an agreement constitutes no pledge and gives rise to no legal privilege under the law of Louisiana, is unreservedly admitted by the judge *a quo* in his written opinion in this case, and is not denied by the counsel for J. U. Payne & Co., and in view of this fact it is not necessary to discuss at any great length the requisites of a pledge.

Under the Civil Code a debtor can not pledge a claim unless "*he make a transfer of it in the act of pledge*" (Art. 3156), and unless further the act mentions "*the amount of the debt*" secured (Art. 3158).

No *transfer* of the anticipated claim against the United States was made, and *the amount* of the claim intended to be secured was not stated, even by giving a maximum amount. There was no delivery of the bounty, or of the evidence of the right to claim it. Every essential element in the contract of pledge was wanting. The agreement did not, therefore, give J U. Payne & Co., as pledgees, any right of preference over other creditors. The Supreme Court of Louisiana has expressly decided that an attempt, in every particular like this, to pledge the bounty was ineffectual and null.

"As relates to the pledge, the facts are that the mortgagor bound herself to *pay the bounty of the government to the creditor immediately after the receipt of the amount*, 'just as if the bounty had been a portion of the proceeds of the crops of the plantation.' The bounty was not *delivered* at the time the attempt was made *to pledge it* as an additional security for the debt. It was collected from the government by the syndic some time after the act of mortgage had been executed. It is

hardly necessary to cite authority in support of the proposition that *delivery* is *an essential* in order to secure a pledge (save in statutory pledges, not the case here). The bounty was not a portion of the proceeds of the crop; it was no part of the crop. We know of no principle of interpretation under which it is possible to hold that the bounty was delivered as required, and came within the provisions of the statutes relative to the pledge as a security." *Delogny vs. Her Creditors*, 48 An. 492-93.

The Delogny case is identical with the present, and establishes beyond any possibility of a controversy, that no pledge was constituted by the agreement now under consideration. It is even stronger, because the mortgagor bound herself to pay over the bounty to the creditor *just as if* the bounty had been a portion of the proceeds of the crops of the plantation, in order to make the obligation in the strongest possible form.

In an earlier case the Supreme Court held: "*That the bare agreement of the parties is not equivalent in any case to a fictitious or symbolical delivery*" within the meaning of the article requiring delivery to constitute a pledge. *Caffin vs Kirwan*, 7 An. 221.

That parties can not create a *privilege* on any particular property by contracting that a privilege shall exist on it, is well settled. In a recent case the Supreme Court of Louisiana, commenting on a written stipulation that insurance premiums should operate as *a privilege* on certain property, say:

* * * "Privileges being creatures of the law, and not of conventions, the mere declarations in the act that the insurance premiums should bear *a privilege* on the property are without effect. *State vs. Bank*, 33 An. 706, opinion by Justice Fenner of counsel for appellees in this case.

And in a later case the same Court say:

"It needs no argument to dispose of his pretensions to a *privilege* on the buildings and improvements as a security for his advances, although such a *privilege was stipulated in his act of pledge* with Logan. The law confers no such privilege, and

none can be enforced. *A privilege can not be created by convention between the parties;* it must derive its existence from the nature of the contract and from the law applicable thereto." *Citizens Bank vs. Moreau*, 37 An. 861, Justice Fenner concurring.

"It is true that R. C. C. 1338 employs the phrase, "the mortgages, liens and privileges," but it is fair to assume that the mortgages, liens and privileges recognized and established by that Code alone were in contemplation of it.

They are merely securities for debts and accessories to principal contracts (R. C. C. 3278, 3284). They "can be claimed only for those debts to which they are expressly granted in this Code" (R. C. C. 3185).

Their effect can not be extended to any cases not therein enumerated by inference or comparison."

Morris et al. vs. Lalaurie et als., 39 An. 53; Justice Fenner concurring.

While the decision in Delogny vs. Her Creditors no longer leaves the question of the asserted equitable lien in this case an open one, and while it is perfectly apparent that the creditor in that case would have been in no better position if he had claimed an equitable lien, still appellees' counsel argue that the equitable lien here asserted would be allowed by the Supreme Court of Louisiana, and in support of this prophecy cite two Louisiana cases prior to the Delogny case. They seem to regard an equitable lien in a Federal Court as a magic device for evading the Louisiana law and as a means of accomplishing by indirection that which the Code expressly forbids. It is idle for both courts and lawyers to speculate as to how a case would have been decided, had it been differently presented, and the only guide is not the law as it might have been, but as it is. We assert that equitable liens, either express or implied, have never been recognized in Louisiana, *since the Louisiana law is purely statutory*, and therefore all liens and privileges must be founded upon statute. But whether this broad proposition is correct or not, and of it there can not be the slightest doubt, certain it is, that the Delogny case establishes beyond

the peradventure of a doubt that the equitable lien or imperfect pledge, or what not, asserted in this case, can not be maintained, and that is all with which we are at present concerned.

The two cases relied upon by appellees' counsel to support the contention that equitable liens give privileges in Louisiana are Succession of Walshe, 9 An. 543, and Webre, Syndic, vs. Beltran & Co., 47 An. 195.

In the Walshe case the facts were that Walshe left at his death two scrip certificates in an insurance company, upon which he owed the company a considerable sum for premiums. These certificates, by an express clause written in them, were not transferable upon the company's books, *except by its consent*, and under this restriction and under its charter the company held the certificates as collateral for any amount that might be due it upon them for premiums. The assured really made a contract by which the company was authorized to set off against him on the amount due him under the certificates any amount that he might owe the company on these certificates for premiums. The Court held, as it was bound to hold under these facts, that the insurance company could not be compelled to pay the amount of its certificates, unless it were allowed to deduct the amount due it for premiums upon them.

In the case of Webre, Syndic, vs. Beltran & Co., A. J. Lacaze made a contract with Beltran & Co. to furnish him with money and supplies to the extent of $8000 during the season of 1892, in order to make a crop of sugar and molasses on his Good Will plantation, and he pledged his crop and mortgaged his plantation to secure said advances. During 1892 R. Beltran, of the firm of Beltran & Co., and as a part of the agreement with Lacaze, applied to the United States authorities (under the act of Congress granting a bounty to the sugar producers) for a license as a producer of the crop of that year upon the Good Will plantation. The license was issued to R. Beltran, who thereby became the only person to whom the bounty could be paid, since the entire legal title was vested in him. After the cession of Lacaze, Beltran

collected the bounty and paid it over to Beltran & Co., to be applied on the debt due them by Lacaze, pursuant to a verbal contract between them made in 1892. Upon suit brought by the syndic of Lacaze to recover this bounty from Beltran & Co., the Court held that the legal title to the bounty was vested in Beltran by virtue of the fact that the license was in his name; that the contract was completely executed between Beltran and the government by the payment of the bounty to him; that in order to obtain the benefit of the license Lacaze and his syndic would have as plaintiffs to attack it and its results; and that the contract between Beltran & Co. & Lacaze authorized the application of the bounty to the debt of Beltran & Co.

These cases are not authority for the maintenance of an equitable lien in Louisiana, and, in passing, it may seem strange that, if equitable liens obtain in Louisiana, no instances of their enforcement can be found in the course of nearly one hundred years. It has been urged that privileges and mortgages are subordinate to *legal rights* existing on the property before the creation of the privilege or mortgage, and this is perfectly true; but it must be remembered that this subordination is only to *legal rights*, and that the specific equitable lien claimed in this case gave no legal right (Delogny vs. Her Creditors, *ante*).

Appellees' counsel concede, as well they might, that the thirteenth article of the contract gives no legal privilege under the law of Louisiana, but argue that there is no reason why the contract should not be specifically enforced under Arts. 1926 and 1927 of the Code. This same reasoning would apply to any imperfect pledge or mortgage, and the result would be that, as soon as a fatal legal defect is discovered in the attempted security, specific execution would be invoked. This might be convenient to the man with the defective security, but is hardly law. It is urged that Arts. 21, 1903, 1964 and 1965 of the Code establish a broad system of equity, but, even if this be true, it does not follow that a broad system of equitable liens obtains in Louisiana. Article 21 declares: "In all civil matters where there is *no express law*

the judge is bound to proceed and decide according to equity." Does any one suppose that privileges in Louisiana are not regulated by the most minute provisions, which are rigidly scrutinized by the courts?

Second.

I.

The stipulation contained in the 13th article of the agreement between Payne & Co. and the Messrs. Ferris did not establish either a *pledge* or *privilege* in favor of Payne & Co. If the parties were in the Louisiana State courts, Payne & Co. would not be entitled to any preference or priority over other creditors in the distribution of the bounty money which the receiver has collected. It would be held in these courts that the stipulations in the 13th article created neither a pledge nor a privilege, and that Payne & Co. would be without any legal right of preference over other creditors. The fund would, therefore, be prorated among all the creditors.

Notwithstanding that this would be the admitted and certain result of a suit on this contract in the State Court, the learned judge *a quo* reached the conclusion that Payne & Co. would be entitled by virtue of the stipulations in the 13th article to a preference in the Federal Court, sitting as a court of equity.

In other words, an agreement which, under the laws of Louisiana, neither creates a pledge nor gives rise to a privilege, will be given the same effect by the Federal Chancellor as if it did create a pledge or give rise to a privilege. Accordingly the creditor, under this agreement, will have no preference, if his suit is decided by a State Court, but will have a preference if his suit is tried by a Federal court; that is, the rule of law which determines *the extent of the creditor's rights* with reference to the common debtor is different in the Federal Court from what it is in the State court. In the State Courts the rule is that the wish, the intention, or the attempt to create a pledge, amounts to nothing, *if any of the essential requisites to the contract of pledge are actually lacking in the*

transaction. But, according to the learned judge *a quo*, in the Federal equity courts the mere expectation, or attempt to create a pledge, will be regarded as actually creating a pledge, not only between the parties but as to third persons, although the transaction presents none of the essential requisites of the contract of pledge, except the bare consent to create it on the one side and to accept it on the other.

Under this view, an intended and inchoate contract of pledge is worthless as a pledge in the State Courts, but in the Federal Courts it is as valid and binding as the most complete and perfect pledge would be.

If we rightly understand it, the process of reasoning by which the learned judge *a quo* reaches the conclusion that a Federal Equity Court can hold that an inchoate and imperfect attempt to create a pledge, though absolulely void under the State laws, is absolutely valid in the Federal Court, is, in substance, as follows:

1. The *Equity powers* of the Federal Courts can not be limited or varied by State legislation. For these powers were conferred *by the Constitution* of the United States, and must, therefore, still exist and be enforced precisely as they were conferred, in 1789, unaffected and undiminished by either State or Congressional legislation.

2. It was one of the powers of Courts of Equity, in 1789, to recognize and enforce under the designation of *equitable liens*, any inchoate and imperfect attempt to create a pledge, and to give the intended pledgee all the rights of preference which would belong to the pledgee under a regular and valid pledge.

3. Therefore, in determining, at the present day, whether a given transaction does or does not create a pledge, the Federal Equity Courts are in no manner controlled by the laws of the States in which they sit, but may recognize and enforce as a pledge, lien, or privilege, a contract which the State laws distinctly declare to be neither pledge, lien, nor privilege.

The foregoing propositions are necessarily involved in the reasoning by which the learned judge *a quo* considered that

he was warranted and required to disregard the laws and jurisprudence of the State of Louisiana in passing upon the question whether the agreement in controversy gave rise to a pledge or lien of any kind. This conclusion is fraught with tremendous and far-reaching consequences to the States of this Union, and it is beyond the power of any man to magnify or exaggerate them. This case, involving as it does the question as to whether there is a uniform system of Federal Equity jurisprudence superior to State statutes, is fully as important as the first case, in which it was decided that there was no common law of the United States.

We believe that none of the propositions stated are true in such a sense as to sustain the conclusion predicated on them, and that the Supreme Court of the United States has frequently so decided.

Before discussing this question, it is necessary to make some general observations upon the nature of the Federal government and its relations to the State governments, and thus determine their respective powers.

It is a familar proposition that the confederated character of the United States government makes each citizen of every State a citizen of two distinct sovereignties, and that there exists an important concurrent jurisdiction in the Federal and State Courts. From the existence of this concurrent jurisdiction, it might be inferred that the same rights were differently adjudicated in the two courts, and it becomes a question of the gravest importance to determine the points of similarity and divergence between their decisions, both at equity and common law, and both upon matters of practice and substantive law. This involves a more comprehensive survey of the subject than is necessary to sustain our position, and we shall limit the argument almost exclusively to matters of substantive law in Courts of Equity, which necessarily includes matter of substantive law in courts of common law, because the reason and extent of the rule are the same in both cases.

The Federal government is one of enumerated powers, formed by concessions of the sovereign States which compose

it, embodied in the Federal Constitution, and by the tenth amendment, it is provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. It has no authority whatever save as to its delegated powers, and as to these it is supreme. In the States there resides an absolute power of legislation, subject to two restrictions—first, the limitations of the Federal Constitution; second, of the State constitutions; and the theory of the reserved powers of the States is the groundwork of our dual form of government. Cooley's Con. Lim., pp. 102 *et seq.*; Hare's Amer. Con. Law, pp. 94 *et seq.* If it be once conceded that the powers of the Federal government are unlimited, then Congress may legislate on all subjects, and, being supreme, may annul any State law. Congress has, however, no such power; and, by the very terms of the Federal Constitution, from which its powers of legislation are derived, must recognize the supremacy of constitutional State laws. The Federal Courts can have no higher authority than Congress, and if Congress can not alter or repeal the laws of a State upon some particular subject within its legislative province, it follows, as a matter of course, that the courts are bound to respect such laws.

The question in this case simply boils down to this: Are the provisions of the Civil Code, annulling such a contract as that sought to be set up by the intervenors, in conflict with the Federal Constitution or laws? If they are, the Federal Courts can disregard them; if they are not, Congress could not alter them, much less the Federal Courts, and any attempt to do so would be in direct contravention of the tenth amendment.

Some unnecessary confusion has arisen in the consideration of the powers of Federal courts of equity, by reason of the fact that their *practice*, save when changed by Federal statute, or by the rules of the Federal Courts, is required to conform to the rules and usages of courts of equity (*U. S. R. S., Sec. 913,* and cases cited), which has been interpreted to mean the procedure of the English High Court of Chancery at that

date, and, hence, is necessarily uniform in all the States Because their *practice* must be uniform and can not be affected by State legislation, the rule has been occasionally so loosely stated by text-writers as to apply to questions of substantive law, though the Federal decisions are to the contrary. Thus, in the case of *Noonan vs. Lee, 2 Black, 501*, it was held that a decree could not be taken in a Federal Court for the deficiency against the debtor after selling the mortgaged property, no matter what the State equity practice might be. The learned judge *a quo* quotes this case in his opinion as authority for the proposition that the equity jurisdiction of the Federal Courts is derived from the Constitution and laws of the United States, and that their power and rules of decisions are the same in all the States.

In this particular case, the expression, equity jurisdiction, refers to a pure matter of *practice*, not of substantive law, and in every case it must be determined whether it relates to practice or rules of substantive law.

There is no Federal statute regulating the decisions of the Federal Courts of equity upon matters of substantive law, and the fact that, at the time of the adoption of the Federal Constitution, a statute was enacted, requiring uniformity in Federal equity practice, is a strong argument to show that it was never contemplated that the rules of substantive law in each State, to which that practice would attach, were to be uniform throughout the Union.

On the other hand, it is argued that the adoption, at the same time, of a section of the Judiciary Act (U. S. Rev. Stats. 721), declaring "the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States," shows that it was never intended that Federal courts of equity should be bound by State laws. This section of the Judiciary Act, declaring the binding effect of State laws upon Federal courts of common law, was simply declaratory of a fact, that would have existed to the same extent without this declaration, namely, that Federal Courts, by virtue of their constitution under an instrument of limited powers, are bound to follow State laws in matters of con-

current jurisdiction, involving no Federal question. There is no process of reasoning, by which the obligation of Federal Courts of Equity to follow State laws can be differentiated from the obligation of Federal Courts of common law to follow State laws. The Supreme Court from an early date has qualified its obligation to follow State laws by announcing that in matters of general jurisprudence, either at common law or equity, not covered by local statutes, it will, under no circumstances, follow State Courts into error, since both reason from the same premises; and, hence, the result has been in a good many cases of this class, as set forth in Holt on Concurrent Jurisdiction, that there is one justice in the Federal, another in the State Courts.

The question, how far State laws and decisions, not in conflict with the Federal Constitution or laws, are binding upon the Federal Courts, has been settled by a long series of United States Supreme Court decisions, which are a necessary consequence of the limited powers of the Federal government. (See *infra*, *Burgess vs. Seligman*, 107 U. S., p. 25.)

The fallacy, into which the learned judge *a quo* fell, would never have been entertained for one minute had not the term "uniform equity jurisdiction" been misconstrued, and it is, therefore, necessary to critically examine its meaning, and thus see whether the conclusions of the learned judge *a quo* can be legitimately deduced from his premise, that Federal equity jurisdiction, meaning jurisprudence, must be uniform in all the States. At the outset, it must be remembered that equity consists of two things: A jurisdiction, a power to hear and determine causes, and a jurisprudence, the substantive rules of law enforced. It consists of a form, its pleading, and a body, its principles. The skeleton, the procedure, is the same in all the States; but the body, the substance, necessarily varies with the statutes of each State.

Prior to the adoption of the Federal Constitution, in 1789, all suits, both in the thirteen colonies and in England, were classified as either common law or equity (eliminating admiralty causes from the discussion), and the nature of the demand determined the forum in which the right must be liti-

gated. Thus, an action on a promissory note, or for damages arising from a tort, was a matter of common law cognizance, while a suit for the specific performance of a contract, or for the enforcement of a trust, was of equitable cognizance. The two systems covered the entire field of juridical rights and remedies, but generally radically differed, both in the nature of the rights enforced and the remedies applied.

It is well to repeat that it is provided by the tenth amendment that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, and it necessarily follows from this provision that the States are supreme in all those matters which involve no Federal question, and have the power to enact such statutes in matters of State law and local policy as may seem to them best. Cooley's Con. Lim., Sixth Edition, pp. 20, 21 and notes.

The Constitution provides that the judicial power of the Federal Courts shall extend to all cases in law and equity arising in all the classes of cases in which they have jurisdiction, enumerating them in detail (Art. 3, Sec. 2); and this provision is construed to mean that the rules of equity jurisprudence then prevailing have been stereotyped by the Constitution and are insusceptible of change save by an amendment of that instrument. This doctrine must be deduced from this section of the Constitution, since there is no other source from which it can spring. The manifest meaning of this provision is, that the litigant shall have complete relief in all cases of Federal cognizance, whether his rights are at law or equity, and this is the interpretation given to it by Hamilton, as shown by the following extract from the Federalist, paper No. 80:

"It has also been asked, what need of the word 'equity?' What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals which may not involve those ingredients of fraud, accident, trust, or hardship, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in

several of the States. It is the peculiar province, for instance, of a Court of equity to relieve against what are called hard bargains; these are contracts in which, though there may be no direct fraud or deceit sufficient to invalidate them in a Court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a Court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the Federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States may afford another example of the necessity of an equitable jurisdiction in the Federal Courts. This reasoning may not be so palpable in those States where the formal and technical distinction between law and equity is not maintained, as in this State, where it is exemplified by every day's practice."

If it be true that the then existing system of equity jurisprudence was adopted, why is it not equally true that the then existing system of law was also adopted, because the provision extends to all cases *at law and equity*, and if this be so, instead of a government of enumerated powers, there is one, the power of which extends to every subject of jurisprudence, and supreme to each State included in the Union. This construction would nullify the tenth amendment and violate the well-known rule of interpretation, that effect must be given to each clause of an instrument. It has been repeatedly decided by the Supreme Court of the United States, that there is no common law of the United States (Cooley Con. Lim., p. 30, note 3 and cases there cited), and exactly the same arguments prove that there is no uniform Federal equity jurisprudence.

But there is another conclusive objection to this construction. At the time of the adoption of the Federal Constitution, there were thirteen distinct colonies, with a distinct system of law and equity in each. In each colony both law and equity had been modified by colonial statutes and by colonial courts, and in no two colonies were they the same. There-

fore, to which one of these thirteen distinct systems does the expression, "all cases at law and equity," refer? It manifestly can not refer to them all, for in that event there would be no uniform Federal equity jurisprudence. It is equally obvious that this expression can not refer to the English systems of law and equity; for it is preposterous to suppose that the colonies, forming a national government, just after they had achieved their independence in a war caused by the unjust laws of the mother country, wished to irrevocably adopt both her common law and equity system, or either. It is true that the common law is the basis of the law in every State save Louisiana, but this does not prove that the United States has the same substratum of jurisprudence as the various States.

Certain powers are conferred upon the Federal Courts with the right to administer complete relief in all those cases, and it was never contemplated that in matters of State law and local policy there should be a uniform system of Federal jurisprudence, either at law or equity. If this were so, the enumeration of granted powers has no effect, for the term, all cases in equity, extends to a large and indefinite class of cases, embracing the entire field of the then existing equity jurisprudence. To give such a construction to this clause would convert what was intended to be a limitation upon the power of the Federal government into an extension of its power.

On the law side there would be a supreme and a concurrent jurisdiction, but on the equity side there would only be a supreme jurisdiction—supreme in the sense that in the matters commonly called concurrent, none of the equity rights, as existing in 1789, can be changed by the States; and, as to matters of exclusive Federal jurisdiction, all cases in equity are necessarily supreme.

Whenever, according to this novel view, a man gets into a Federal Court of Equity, he can insist upon his rights being adjudicated exactly as they would have been in equity, in 1789; but the question at once arises: In what equity—in which one of the thirteen distinct colonial systems?

No Federal decision has ever held that there must be a uniform equity jurisprudence in the Federal Courts throughout the United States, and, had it not been that the meaning of jurisdiction has been unfortunately confounded with the meaning of jurisprudence, this question would never have perplexed any one.

The term jurisdiction, in its etymological signification, means the power to declare the law, and this signification corresponds closely to its accepted legal meaning. It has been defined briefly and clearly by the U. S. Supreme Court in the following words: "The power to hear and determine a case is jurisdiction." U. S. vs. Arredondo et al., 6 Peters, 691, 709.

In this case the question was as to the power of a Federal Court of Equity to take cognizance of a land claim arising in Florida, and to pass upon rights in reference thereto, which accrued under the laws of the Spanish government in force prior to the acquisition of Florida by the United States. It was held that the court had jurisdiction, *i. e.*, the power to hear and determine this cause, but that the substantive rights in controversy must be controlled by the Spanish law.

Both the Federal and State laws fix the jurisdiction of their respective Courts, and from time to time change the jurisdiction of those Courts. The power to hear and determine causes does not mean that the causes must always be determined in the same way, but simply that an adequate machinery has been provided to dispose of those causes. A Criminal Court would have the same jurisdiction though the statutes should prescribe that the same state of facts should, at one time, be murder, at another time, manslaughter, and, at another time, justifiable homicide. A court of probate would have the same jurisdiction, though, at one time, the statute should require a will to be executed in the presence of five witnesses and, at another time, in the presence of only two. A court of equity would have the same jurisdiction, though, at one time, the statute of registry should prescribe that a second mortgagee, with actual notice of a prior unrecorded mortgage, should take subject to that mortgage,

and, and at another time, that a second mortgagee, even with actual knowledge of a prior unrecorded mortgage, should not be affected thereby; though the law of assignments should, at one time, allow preferences, and, at another time, forbid them; though, at one time, the statute of frauds and perjuries should allow the specific performance of verbal contracts for the sale of real estate, and, at another time, annul them; though, at one time, alimony should be allowed as an incident to a suit for separation from bed and board, and, at another time, forbidden; and though, at one time, a trust in favor of an unincorporated religious body should be denied (*e. g.* Mr. Minor's famous example, "The Baptist Association, that for common meets in Philadelphia"), and, at another time, enforced.

The Supreme Court of the United States has held repeatedly that in the assignment of a cause in a Federal Court to the law or the equity side thereof, the uniform test to be applied is: How would the cause have been allotted in 1789? Whether it goes to the law or equity side is to be determined by the same criterion that obtained in 1789, viz.: Was it then a matter of common law or equitable cognizance (Mississippi Mills vs. Cohn, 150 U. S. 202); but after the allotment has been made, the substantive rights are to be adjudicated according to the existing law of the State in which the case arose, when no Federal question or question of general law is involved. The phrase, uniform equity jurisdiction, means neither more nor less than this, and no Federal Court has yet held that there must be a uniform equity jurisprudence in all the States, nor will there ever be such a decision under present conditions.

II.

It is now necessary to examine the authorities and see how far the principles which we have attempted to deduce from the limited powers of the Federal government have been borne out in practice.

Pomeroy, in his great work on Equity Jurisprudence, says,

in Vol. 1, Sec. 297, in discussing the substantive rules of law, applied by the Federal equity courts in the various States:

"In order to prevent a misconception of the foregoing rules concerning the equitable jurisdiction of the national courts, there is one limitation which must be constantly borne in mind. Since the original jurisdiction of the United States Courts, especially of the Circuit Courts, in large measure depends upon the State citizenship of the litigant parties as its sole basis, it follows that in some cases of ordinary controversies—in all of those which do not directly arise under statutes of Congress or provisions of the United States Constitution—the subject matter of the suit, the primary rights, interests or estates to be maintained and protected are created and regulated by State laws alone. While, therefore, it is correctly held that the equitable jurisdiction of the national courts, their power to entertain and decide equitable suits and to grant the remedies properly belonging to a court of equity, is wholly derived from the Constitution and laws of the United States, and is utterly unabridged by any State legislation, yet, on the other hand, the *primary rights, interests and estates which are dealt with in such suits, and are protected by such remedies, are within the scope of State authority, and may be altered, enlarged or restricted by State laws.* The equitable jurisdiction of the national courts is not directly affected by the State statutes, but what may be fully accomplished by the exercise of that jurisdiction, what estates, property rights and other interests of the litigants may be maintained, enforced or enjoyed by its means, must depend to a great extent upon the policy of legislation adopted in each individual State."

This is a true exposition of the rule, and the one upon which the Federal Courts have consistently acted. Pick up any volume of United States Supreme Court Reports and glance at the cases where the jurisdiction of the State and Federal Courts is concurrent, and not involving a matter of commercial law or of general jurisprudence. The first question in substantially every case is: What is the State law? A matter ceases to be a matter of general commercial law, or

of general jurisprudence, just as soon as a State legislates upon that particular subject, and the Federal Courts, no matter whether, prior to the enactment of the statute, their view of the law agreed or disagreed with that of the State courts, are bound, thereafter, to follow the authoritative exposition of the State statute by its highest Court. Nor does it follow that a matter is a matter of general jurisprudence simply because there is no State statute on that subject. In its nature it may be a matter of local policy, which can and must be regulated by the decisions of each State, and then the Federal Courts must follow the State decisions.

The effect of State laws and decisions upon the Federal Courts was carefully considered in the leading case of *Burgess vs. Seligman*, 107 U. S., p. 20, a common law case, and the rule upon this subject was restated after the review of fifty United States Supreme Court decisions, many of which were equity cases. The sources of the rule, the irresistible logic of *in consimili casu* of law and equity in the Federal Courts so far as obedience to State laws is concerned, and its applications by the Federal Courts, make it certain that it was intended to be a guide, both in common law and equity cases.

On pages 33 and 34, the Court says:

"The existence of the two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial

law and general jurisprudence. * * * As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail" (see Note 1).

This case has been affirmed in Pana vs. Bowles, 107 U. S., p. 541, where the Court say: "See also Burgess vs. Seligman, *ante*, p. 20, where the question how far the Courts of the United States are bound by the decisions of the State Courts is carefully re-examined and the rules on the subject stated with precision." And in the following cases: Carroll Co. vs. Smith, 111 U. S., p. 563; Anderson vs. Santa Anna, 116 U. S. 362; Bolles vs. Brimfield, 120 U. S. 764; Folsom vs. Township Ninety-Six, 159 U. S. 625. See also Cooley's Con. Lim. (6th Edition), pp. 20, 21 and 22 and notes.

Federal Courts always follow, in accordance with the above stated rule, the State laws and decisions governing descents, fraudulent assignments, taxation, limitation, save where the Federal equity practice requires a different rule of limitation, frauds and perjuries, assignments for benefit of creditors, what the Supreme Court of the United States designates as "rules of property," and many other statutes and decisions, all of which are different in every State. As to assignments, see South Branch Lumber Company vs. Ott, 142 U. S., p. 628, an equity case, where the Court says: "The question of the construction and effect of a statute of a State regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest Court of the State, establishing a rule of property, are of controlling authority in the Courts of the United States." This is an affirmation in the words of what is said in the case of the Union National Bank vs. the Bank of Kansas City, 136 U. S., p. 235, an equity case. In 148 U. S., May vs. Tenney, also an equity case, on pages 64 and 65 the Court says:

"The decision in White vs. Cotzhausen, 129 U. S. 329,

construing a similar statute of Illinois in accordance with the decision of the Supreme Court of that State, as understood by this Court, has, therefore, no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by Mr. Justice Field, speaking for this Court: 'The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the Legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other.' Christy vs. Pridgeon, 4 Wall. 196, 203; see also Detroit vs. Osborne, 135 U. S. 492."

How is it possible, if the position of the judge *a quo* be correct, for a Federal Court of equity to recognize assignments with preferences in one State, where they are allowed, and assignments without preferences in another State where they are forbidden?

This is certainly not uniform equity jurisdiction in the sense that its rules must be exactly the same in all the States. The Louisiana law regulates preferences, and the case at bar comes within its provisions on this subject.

Even the admiralty laws, an exclusive branch of Federal jurisdiction, vary in the several States, because the Admiralty Courts, under certain restrictions, enforce liens created by the State laws, and yet admiralty jurisdiction is the same in all the States. In the much quoted case of the *Bank of Augusta vs. Earle, 13 Peters, 519*, it was argued that the contract was contrary to the policy of the laws of Alabama, and, therefore, could not be enforced. On page 597 the Court say:

"When the policy of a State is thus manifest the Courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void."

A fortiori does this reasoning apply, when a contract, like the one attempted to be set up by the intervenors, is impossible under the State laws.

So anxious are the Federal Courts to conform to the substantive rules of law of the various States, that the Supreme Court has held in three cases, *Green vs. Neal's Lessee, 6 Peters, 291*, in which the necessity for such conformity is elaborately and convincingly discussed, *Suydam vs. Williamson, 24 How. 427*, and *Leffingwell vs. Warren, 2 Black, 600*, that it will follow the settled laws of property in any State, although it may be thereby required to overrule its own decisions, which, when rendered, were in accordance with the decisions of the State Courts at that time. So it appears that the Supreme Court has no pride of opinion, when the rights of the citizens of a State demand that the rules of property, as administered in the concurrent jurisdictions, shall be the same.

In the case of *Barrow vs. Milliken, 74 F. R. 612*, decided, one year ago, by the same Court, which certified the instant case, an equitable lien was allowed, and the judge *a quo* stated in his written opinion that that case was decisive of this one. The fact that the judges of the Circuit Court of Appeals have doubted their own decision by certifying the same question to this Court is strongly persuasive of the fact that they wish to invoke the aid of this Court as a convenient means of discarding error. In *Green vs. Neal's Lessee, supra*, the Court said: "That it would be a strange perversion of principle if the judicial exposition of State laws by State tribunals could be disregarded by the Federal Courts."

III.

2.

The bill of complaint in this case alleges that the defendant corporation is insolvent, and asks that a receiver may be appointed in order to effect a ratable distribution of the defendant's assets. The answer filed by the defendant company admits its insolvency and unites in the prayer of the bill. Thus, the object of the appointment of a receiver in this cause was to effect the same result that would have been attained by a liquidation under the State law.

Independently of any proof of insolvency, Arts. 3183 and 3184 of the Civil Code require a ratable distribution of the

debtor's property. These articles are simply an expression of the fundamental principle of all systems of insolvency law. There is, therefore, but one question in the case, and that is, whether a ratable distribution of the defendant's property is binding upon this Court, unless lawful preferences, recognized by the State law, can be established. This question, like every other question of Federal authority, can be determined only by reference to the Federal Constitution and the decisions construing it, and by this chart we must be guided. The discussion of the constitutionality of State insolvency laws is, in our opinion, strictly analogous to the question at issue.

One of the enumerated powers of Congress is the right to establish a uniform law of bankruptcy, and, in the actual exercise of this power, it may override the lien laws enacted by the various States. Now, it is a well settled rule of construction, that the grant of a power in an instrument, designed to confer limited powers, is an implied exclusion of other powers of a similar nature. Therefore, Congress is the sole branch of the Federal government empowered to annul the State lien laws, and if Congress does not exercise its power, it is competent to the States to establish laws of insolvency, and to regulate priorities, when there are no insolvency laws. The contention at bar is that State lien laws are not only subject to the supremacy of a national bankrupt act, but also to the imputed power of a Federal Chancellor to declare any State lien law unconstitutional when it comes in conflict with an equitable doctrine, prevailing in 1789.

Early in the history of our government the question arose as to the power of the States to enact insolvency laws, and Chief Justice Marshall, in the famous case of Sturges vs. Crowninshield, 4 Wheat. 122, held that the grant to Congress of the power to establish uniform bankruptcy laws was not incompatible with the passage of insolvency laws by the States, not impairing the obligation of contracts, when Congress had declined to exercise its power. This case has become one of the landmarks in Federal jurisprudence, and has been reviewed and affirmed a score of times. It follows that,

if the States have the constitutional right to enact insolvency laws, the Federal Courts must enforce these laws, and allow or deny liens for exactly the same causes that would be recognized in the State Courts. It is needless to quote many Federal decisions in support of a proposition which none will deny, but see Ogden vs. Saunders, 12 Wheat. 213, where the subject of State insolvency laws is discussed in many phases; Boyle vs. Zacharie, 6 Pet. 348; Baldwin vs. Hale, 1 Wall. 228; Gilman vs. Lockwood, 4 Wall. 409; Coles vs. Cunningham, 133 U. S. 114. In Brown vs. Smart, 145 U. S. 457, the Court say:

"The principles which underlie this case are clearly established by the decisions of this Court. So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a State can not by such a law discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings of insolvency. Sturges vs. Crowninshield, 4 Wheat. 122; Ogden vs. Saunders, 12 Wheat. 213; Baldwin vs. Hale, 1 Wall. 223; Gilman vs. Lockwood, 4 Wall. 409. *Yet each State, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.* Smith vs. Union Bank, 5 Pet. 518, 526; Crapo vs. Kelly, 16 Wall. 610, 630; Denny vs. Bennett, 128 U. S. 489, 498; Walworth vs. Harris, 129 U. S. 355; Geilinger vs. Philippi, 133 U. S. 246, 257; Pullman Palace Car Company vs. Pennsylvania, 141 U. S. 18, 22"

Brown vs. Smart, as well as many other Supreme Court cases, were cited in Butler vs. Goreley, 146 U. S. 313, in support of the proposition that there is no force in the position that a State insolvency law is unconstitutional.

All the foregoing cases are valuable because they show that in each instance the Federal Courts enforce the State law of liens exactly as they find it, and they all, by implication,

necessarily and emphatically negative the idea that there is such a thing as a uniform system of Federal equity jurisprudence, or that there is one set of liens in the State and another in the Federal Courts. We have quoted the equity cases of Union National Bank vs. Bank of Kansas City, 136 U S. 235; South Branch Lumber Co. vs. Ott, 142 U. S. 628, and May vs. Tanney, 148 U. S. 64, in each one of which the Federal Courts followed the assignment law of the various States in which the cases arose, and pointed out that this was not uniform equity jurisdiction (*i. e.*, jurisprudence). It is hardly necessary to add that assignment laws and insolvency laws both have the same object in view—the distribution of a debtor's assets, though the means prescribed are different.

In Bamberger vs. Schoolfield, 160 U. S. 149, the Court, through Mr. Justice White, again affirmed the rule enunciated in Union National Bank vs. Bank of Kansas City, *supra*, and in that case enforced a preference allowed under the Alabama law. It was expressly decided in Tua vs. Carrière, 117 U. S. 201, appealed from the Circuit Court of the United States for the Eastern District of Louisiana, and affirmed, that the insolvent laws of Louisiana are in force, and this decision was followed in Shwartz et al. vs. H. B. Claflin Co., 60 F. R. 676. In both these cases attachments in the Federal Court were dissolved by a cession in the State Court. It can hardly be questioned that a receivership of an insolvent corporation in a Federal Court is equivalent to a liquidation of an insolvent corporation in a State Court, and there should be the same result reached in both courts in the distribution of assets.

It is a work of supererogation to cite more Federal cases, holding that State lien laws, as applied to insolvency proceedings, assignment laws, to the distribution of a decedent's assets and to all other subjects, are binding upon the Federal Courts both of law and equity, but, recognizing the vast importance of principle involved in this case, we desire to quote the following cases to show how inflexibly the rule has been applied. The syllabus of Smith vs. Union Bank of Georgetown, 5 Pet. 518, is:

"*The right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered*, and not on the law of the place of the contract, or of the domicile of the deceased, and, therefore, where administration was taken under the laws of Maryland, of assets there, where all debts are of equal dignity and the intestate was domiciled, and owed a bond debt in Virginia, where bond debts have a preference, held that the bond debt had no prior right of payment out of the assets in Maryland."

In Marbury vs. Kentucky Union Land Co., 62 Federal Reporter, page 353, decided by the Circuit Court of Appeals for the Sixth Circuit, the Court say:

"The last question for our consideration is whether the distribution of the estate of the land company shall be according to the ordinary equitable rule, or in accordance with the Kentucky statute which governs the distribution of the estates of the deceased insolvents."

After a full discussion of the subject, the Court further say:

"The distribution of the land company's estate should be, therefore, in accordance with the rule prescribed by Sec. 35, Art. 2 of chapter 39 of the general statutes of Kentucky, concerning estates of decedents" (page 356).

In Etheridge vs. Sperry, 139 U. S., page 227, the Court say:

"While chattel mortgages are instruments of general use, each State has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of State regulation. We are aware that there is great diversity in the rulings on this question by the Courts of the several States, but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages, that this Court will accept the settled law of each State as decisive in respect to any case arising therein. Chicago Bank vs. Kansas City Bank, 136 U. S. 223."

This decision announces the doctrine that the States can regulate the disposition and conveyance of personal property in the most emphatic manner, which is an affirmation in part of the more extensive rule quoted in Brown vs. Smart, *supra*.

We come now to the important case of Brine vs. Insurance Company, 96 U. S., p. 630, in which the opinion was delivered by Mr. Justice Miller, that great expounder of constitutional law. The present Chief Justice of the United States Supreme Court represented the appellants, and succeeded in reversing the lower court. The question there at issue was as to the binding effect of the Illinois statutes regulating the foreclosure of a mortgage, upon a Federal court of equity sitting in that State. The Court held that these statutes were binding upon the Federal Court, and that all private contracts are made with special reference to the laws of the place where they are made and to be performed, and that these laws are incorporated into the contract. Applying these principles to the instant case, appellees' contract was made subject to the law of Louisiana, by which an equitable lien is expressly excluded. In Brine vs. Insurance Company it was urged that the Federal equity practice must be uniform in all the States, and the inference was drawn that Federal equity jurisprudence must be uniform. Mr. Justice Miller said that no Federal decision had held that equity courts could deny substantial rights conferred by State statutes. We do not believe in quoting copious extracts from opinions, but think that the importance of the principle involved in the present case justifies us in departing from the rule, when a leading case bears so closely upon the discussion and presents the subject in such a lucid way, especially in view of the fact that appellees' present contention is reviewed.

On pp. 633-4 the Court say:

"It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a Court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Courts as they existed prior to the declaration of

independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the Circuit Courts for their own guidance. And treating all the proceedings subsequent to a decree, which are necessary for its enforcement, as a matter of practice and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the Court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the Court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State, existing at the time a mortgage, or any other contract, is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from State control of the chancery practice of the Federal Courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms nec-

essary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form.

"Let us see if the statutes of Illinois on this subject do confer positive and substantial rights in this matter" (page 634).

"It is not denied that in suits for foreclosure in the courts of that State the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and is one which must govern those courts.

"Nor is it pretended that this Court, or any other Federal Court, can in such case review a decree of a State Court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right Olcott vs. Bynum et al., 17 Wall. 44; *Ex parte* McNeil, 13 Ib. 236" (p. 635).

"But there is another view of the question which is equally forcible, and which leads to the same result. All contracts between private parties are made with reference to the law of the place where they are made or to be performed. Their construction, validity and effect, are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become part of the contract" (page 637).

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases, even in this

Court, in which the proposition that the rules of practice of the Federal Courts in suits in equity can not be controlled by the laws of the States. is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those Courts substantial rights conferred by the statute of a State, or to add or take from a contract that which is made a part of it by the law of the State, except where the law impairs the obligation of a contract previously made. And we are of opinion that Mr. Chief Justice Taney expressed truly the sentiment of the Court as it was organized in the case of Bronson vs. Kinzie, as it is organized now, and as the law of the case is, when he said that 'all future contracts would be subject to such provisions, and they would be obligatory upon the parties in the Courts of the United States, as well as those of the States' " (page 639).

Mr. Justices Miller quotes approvingly an opinion of Mr. Chief Justice Taney in the extract just given, and we now desire to give an excerpt from an opinion of Chief Justice Taney on circuit, in Maryland, which settles this question of the obligation of Federal Courts of Equity to follow the State law in matters of local policy, so far as unanswerable logic can settle anything.

The decision places the law upon that solid foundation of common sense and justice from which it can never be dislodged. We ask the attention of the Court to the argument of counsel for the complainant in that case because he pinned his faith to some of the same cases, upon which counsel for appellees in this case rely. In this case the complainant attempted to enforce a bequest in favor of a vague charity, and the Court held that it was bound to follow the Maryland decisions, which had held such a bequest void.

"The Circuit Courts of the United States administer the laws of the States in which they sit, unless these laws are in conflict with the Constitution of the United States, treaties or acts of Congress; and as a general rule, regard the decisions of the highest judicial tribunals of the State as conclu-

sive evidence of law. We do not speak of matters of practice, or the forms of proceeding; but of decisions upon the right or claim in dispute between the parties, where that right depends upon the laws of the particular State.

The cases of Swift vs. Tyson, 16 Pet. (41 U. S.) 1, and Carpenter vs. Providence Ins. Co., *Id.*, 511, 512 were cases depending upon the usage of commerce and the general principles of commercial law. And the Supreme Court have always said that in case of that description, where the State Court does not decide the cases upon any particular law of the State or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as a conclusive evidence of the commercial law of the State, and will not be followed as such by the Supreme Court. And the reason of this distinction is obvious. The State Court does not decide in such cases upon the peculiar laws and institutions of the State. Its decision, therefore, is no evidence that any law has been adopted by the State in conflict with the general principles which regulate commercial contracts throughout the commercial world.

So, too, as relates to the jurisdiction of the Circuit Court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English Chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States in administering the remedy for an existing right. *The rule applies to the remedy and not to the right; and it does not follow that every right given by the English law, and which, at the time the Constitution was adopted, might have been enforced in a court of chancery can also be enforced in a Court of the United States; the right must be given by the law of the State, or of the United States. It is the form of remedy for which the Constitution provides; and if a complainant has no right, the Circuit Court, sitting as a court of chancery, had nothing to remedy in any form of proceeding.*

In the case before the Court the question is: Is the bequest which the complainants claim a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective States. Some of the States sanction devices of this description, some do not, and undoubtedly it depends upon every State to determine for itself *to whom and in what form and by what instrument any property within its borders may pass by devise or otherwise.* The Court of Appeals in Maryland have decided that a bequest like this is void by the laws of the State and passes no right to any one. This Court is bound to respect this as the law of the State, and if there is no right vested in the complainants by this bequest, this Court can not create one. There is, therefore, neither an equitable nor legal title upon which the powers of a Court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants.

This is not a proceeding to appoint a trustee to execute a valid trust, nor indeed are there any *cestuis que trustent.* This doctrine is fully maintained in the case of Wheeler vs. Smith, 9 How. 950 U. S. 55, which was decided at the last term of the Supreme Court. The cases of Trustees of Philadelphia Baptist Ass'n vs. Hart's Ex'rs, and Vidal vs. Girard's Ex'rs, were in that case recognized as depending upon the laws of the respective States, and not merely upon the doctrines of the English Chancery. The bill in this case must therefore be dismissed with costs." Meade vs. Beale, F. C., Vol. 16, Case No. 9371.

Fortunately, we are not left to conjecture whether the free grace of a Federal Chancellor, by the potent magic of an equitable lien, can convert an imperfect pledge, under the Louisiana law, into a perfect pledge, because this question has been set at rest by the Supreme Court of the United States, in the case of Casey vs. Cavaroc, 96 U. S. 467, a case involving exactly the same questions as the one at bar, which went up from the Circuit Court of the United States for the District of Louisiana. In that case, the receiver of an insolvent bank filed a bill in equity in the Federal Court to recover some

securities which the bank, prior to receivership, had attempted to pledge, on the ground that the pledge was imperfect and conferred no right on the pledgee as against the other creditors of the bank. The Circuit Court dismissed the bill and the receiver appealed and reversed the lower Court. The Supreme Court reviewed the Louisiana law of pledge at great length and the decisions thereunder, and concluded that the pledge was defective under the Louisiana law, and therefore could not be recognized in the Federal Court, by which law that Court was governed.

It was urged in the argument that a similar pledge had been sustained by the Supreme Court itself in a case going up from New York, Clarke vs. Iselin, 21 Wall. 360, and that that decision was binding upon the Court. The Court states in its opinion that the New York case had been governed by New York law, where such a pledge was valid, but that the case at bar was controlled by Louisiana law, where such a pledge was invalid. In Casey vs. Cavaroc, the pledgee, recognizing, as the pledgee does in this case, that he could get no comfort from Louisiana law, invoked the power of equity to save him, but equity mocked at him, and said, in effect: "Shall I, in a matter of State law and local policy, recognize rights which are denied to you by the State Courts?" On page 491, the Court say:

"These considerations also supply an answer to another suggestion that equity will consider as done what the parties intended should be done, which, it is assumed, was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in the view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued."

In the case at bar all the creditors regarded the sugar bounty as a common fund, and their rights certainly accrued to subject it. The Court will observe the exact parallel between this case and the case at bar. In both cases there are insolvent corporations; in both cases a pledge is attempted

prior to insolvency, which is invalid under the Louisiana law; in both cases equity is called upon to perfect the pledge; in one case equity declined to interfere, and, if experience and reason be any guide, it will also decline to interfere in this case.

Casey vs. Cavaroc was a much stronger case for equitable intervention than the present one; for, in that case, nearly all the elements of a legal pledge existed.

Appellees' counsel attempts to distinguish between an executed and an executory contract, and claims that a mere promise, though unaccompanied by a transfer or an assignment, will invest a court of equity with power to transform inchoate rights into perfect equitable rights, and to enforce them by appropriate equitable remedies, while an attempted execution of the contract by the parties themselves places them beyond the sustaining grasp of the chancellor's hand. Upon this principle equity will not help those who try to help themselves, but extends its favors solely to those who promise and do nothing, which is contrary to one of its maxims—"*Vigilantibus non dormientibus æquitas subvenit.*"

If, according to this reasoning, in the case of Casey vs. Cavaroc, 96 U. S. 467, the bank had promised to pledge its securities to the Credit Mobilier, instead of actually attempting to pledge them, the Credit Mobilier would have had an indefeasible right to them as against all the other creditors of the insolvent bank.

Casey vs. Cavaroc was followed in Bidstrup vs. Thompson, 45 F. R., p. 454, a case decided by the Circuit Court for the Eastern District of Louisiana. In that case the Louisiana law of pledge was applied.

If the so-called doctrine of an equitable lien is held to apply to the instant case, then it is true that the insolvency laws of Louisiana, and the other States, to the extent that they govern preferences, can always be defeated, where one creditor can get the common debtor to make him a promise, of which a Federal Court of Equity will take cognizance, to devote a portion of his assets to the payment of his specific debt. Surely this Court must recoil from such a consequence.

We invite the attention of the Court to the following equity cases, in each of which the State law was followed:

State Railroad Tax Cases, 92 U. S., pp. 575, 617.

Van Rensselaer vs. Kearney, 18 U. S., pp. 631, 636 (11 H. 297).

Carroll vs. Safford, 15 U. S., p. 509 (3 H. 441).

Nesmith vs. Sheldon, 17 U. S., p. 417 (7 H. 812).

Beauregard vs. City of New Orleans, 18 How. 497 and 502 (1 Miller, 422).

Davie vs. Briggs, 97 U. S. 628.

Elmendorf vs. Taylor, 6 U. S. 360 (10 W. 152). Opinion delivered by Chief Justice Marshall.

Ridings vs. Johnson, 128 U. S. 212.

Mellen vs. Buckner, 139 U. S. 388.

New Orleans Bank vs. LeBreton, 120 U. S. 765.

The cases of Beauregard vs. City of New Orleans, New Orleans Bank vs. LeBreton, Ridings vs. Johnson, and Mellen vs. Buckner, *supra*, went up from Louisiana, and in all these cases a Federal Court of Equity enforced the Louisiana law exactly as it found it.

See also New Orleans Waterworks Co. vs. Southern Brewery Co., 36 F. R. 833, where the doctrine was applied in a novel but correct manner.

III. ~~IV.~~

It has been long settled that a man neither gains nor loses anything by going into a Federal Court in matters of concurrent jurisdiction involving questions of local law and State policy, and in support of this proposition we quote the following extract from *Ex parte* McNeil, 13 Wall. 243, which is also valuable because it explodes the notion that jurisdiction is jurisprudence. *Ex parte* McNeil, 13 Wall. 243:

"It is argued further that a State law could not give *jurisdiction* to the District Court. This is true. A State law can not give *jurisdiction* to any Federal Court; *but that is not a*

question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction that exists already, and it is invoked to give effect to the right by applying the appropriate remedy. *This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality.* In no class of cases has the application of this principle been sustained by this Court more frequently than in those of admiralty and maritime jurisdiction."

This case was affirmed in Cooley vs. Northern Pacific Railroad Co., 159 U. S. 582, where the Court say, after discussing the meaning of equitable jurisdiction:

"It was also said in Davis vs. Gray, 16 Wall. 203, 231, that '*a party by going into a National Court does not lose any right or appropriate remedy of which he might have availed himself in the State Courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals.*'" Other cases to the same effect are Holland vs. Challen, 110 U. S. 15; Marshall vs. Holmes, 141 U. S. 580; Johnson vs. Waters, 111 U. S. 640; Arrowsmith vs. Gleason, 129 U. S. 86.

Should appellees' contention be sustained, they will, by a mere choice of a Federal tribunal, have deprived appellants of their undoubted right in the State Courts to participate ratably in the distribution of the fund.

In Lippincott vs. Mitchell, 94 U. S. 770, the Court say:

"This construction is a rule of property of the State, and we are as much bound by it as if it were a part of the statute. *It is our duty to apply the law of the State as if we were sitting there as a local Court, and this case were before us as such a tribunal.*" Leffingwell vs. Warren, 2 Black. 579; Olcott vs. Bynum, 17 Wall. 44.

In Daniels vs. Case, 45 F. R. 845, the Court, after forcibly discussing the binding effect of State statutes and decisions upon Federal Courts, say:

"The plaintiff, because of residing on the west side of Kaw river, with the right to sue in the United States Circuit Court, would have a good tax title, while a citizen of Missouri on the east side of the river would have no title. *The public sense of justice would challenge to the death any such rule of inequality.*"

IV.

We now wish to briefly review some of the authorities relied upon by appellees.

It is well to bear in mind in the examination of cases the following principle enunciated by the Circuit Court of Appeals for the Eighth Circuit in United States, vs. Trans-Missouri Freight Association, 58 F. R. 73: "But the language employed by the Courts in these cases should be read in the light of the circumstances under which it was uttered and with due reference to the point actually adjudicated." Applying this principle, the cases cited can not control this case unless the point actually decided was that there must be a uniform Federal equity jurisprudence, not jurisdiction, and that substantive rights denied by State statutes are allowed in Federal Courts of Equity. In not one of the cited cases was this held, and therefore they are not authorities to sustain appellees' contention.

The earliest case on the subject is Robinson vs. Campbell, 3 Wheat. 212. One of the points in that case was whether an equitable title could be set up as a defence in an action of ejectment, and the Court held that it could not be, no matter what the State practice was. The syllabus correctly expresses the decision on this point:

"To determine whether there is plain, adequate and complete remedy at law, so as to prevent a resort to the equitable powers of the Courts of the United States, reference must be had to the principles of the common law of England, and not to the laws of the State where the Court sits.

"If the State laws have given a legal remedy founded on an equitable title, the equity jurisdiction of the Circuit Court is not affected thereby."

The next case is United States vs. Howland, 4 Wheat. 108.

In this case it appears that the United States filed a bill of equity in the Federal Circuit Court for Massachusetts to recover money due for duties. The defendants demurred on the ground that the case was not one of equitable cognizance, as a statute of Massachusetts gave the government the right to proceed at law in such cases. The lower Court sustained the demurrer and dismissed the bill, but the Supreme Court held, that under the facts of the case a trust existed, and an accounting would be required, so that the case was, on general principles, one of equitable cognizance, and that the State law could not vary the jurisdiction in the Federal Court. The case was remanded to be proceeded with in equity. This decision, therefore, simply announces the proposition, that whether a case shall be proceeded with at law or in equity in the Federal Courts depends on general principles governing the allotment of causes to the law or equity side prevailing at the time of the adoption of the Federal Constitution, and not on State legislation. The expressions used by Ch. J. Marshall must be understood with reference to the point he was deciding.

In the case of Neves vs. Scott, 13 How. 270, two questions of general equity jurisprudence were presented, one as to the nature of an executed trust, the other as to who were volunteers. The Court say: "No question has arisen concerning *any statute law of Georgia*, nor was it then, nor is it now, suggested that any word or phrase, or provision of the articles, should bear any peculiar or technical meaning by reason of any local law or custom." In that case it was urged that a decision of the Supreme Court of Georgia in a similar case was binding upon the Supreme Court, but the Court held that both courts in a matter of that nature resorted to the decisions of the English High Court of Chancery, and that the decision of the Georgia Court was not binding upon it.

In the case of Fitch vs. Creighton, 24 How. 160, the ques-

tion at issue was as to the form of procedure, and the Court held that according to the principles governing the allotment of causes in the Federal Courts, it was a proper case for equitable relief, and that State statutes could not change the nature of Federal remedies.

The next case is Payne vs. Hook, 7 Wall. 425. In that case a bill in equity was filed by a citizen of Virginia against the Public Administrator of Calloway county, Mo., to obtain a distributive share in an intestate estate. A demurrer was filed on the ground that under a Missouri statute a State Chancery Court would have no jurisdiction in such a case, because this branch of equitable jurisdiction had been confided to a special Probate Court. The Court held that the bill stated a proper case for equitable relief, according to the principles obtaining in 1789, and that a Federal Court of Equity did not follow the allotment in State Courts, when the assignment there conflicted with its fundamental principle of allotment. The lower court sustained the demurrer, but the Supreme Court reversed its decision. The right existed both in the State and Federal Courts, and it was simply a question as to the forum in which this right should be litigated.

In the case of Fletcher vs. Morey, Federal Cases, No. 4864, an equitable lien was enforced in Massachusetts. The Court held that the agreement creating the lien was valid between the parties and not prohibited by the laws of Massachusetts, and that the lien could be enforced under the general equity jurisdiction of a Federal Court *as well as under its particular jurisdiction, conferred by the Bankrupt Act of 1841, C. 6, Sec. 8,* thus placing it jurisdiction upon a double ground. The Court said that it had yet to learn that no equitable lien could exist in Massachusetts, though it was true that no remedy (statutory evidently) had been provided for its enforcement in the State Courts. By reference to Jones on Liens, Vol. 1, Sec. 30, it will be seen that equitable liens are enforced in the Massachusetts State Courts. But is this case authority for the proposition, that a right denied in the State Court must be enforced in a Federal Court of Equity?

The judge *a quo*, in his written opinion, lays great stress

upon the decision in Kirby vs. Lake Shore Railroad Company, 120 U. S. 130. In that case, an equity case, the only question was as to the time from which the statute of prescription ran in bar of suit, and extinctive prescription is the loss of a remedy.

The case went up from New York, and it was argued that the Federal Court must adopt the New York statute of limitation as construed by its highest courts, which was contrary, so it was stated in argument, to the uniform practice in the Federal Courts of Equity, determined by numerous Federal decisions. The Court held that the construction of the New York statute was doubtful; that its equity jurisdiction must be uniform in the several States, and that it could not change its long established rule, which was based upon an ancient equity principle. The point decided was that "it is an established rule of equity, as administered in the courts of the United States, that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasoable diligence, it might have been discovered" (p. 136).

This case decided no more and no less, and bears out our contention that the Federal equity *practice* must be uniform in all the States. Certain it is, that the decision was not contrary to the State statute, since its construction was doubtful.

In the case of *Gordon vs. Hobart*, F. C., No. 5609, another equity case, it was argued that, under the facts of that case, the plaintiffs had a remedy at law under the State law, and, therefore, could not go into a Federal Court of Equity. The Court held very properly that the Federal equity jurisdiction must be uniform, and that the fact that the remedy in the State Court was at law did not prevent Federal equity jurisdiction from attaching. In the present case it must never be forgotten that there is no right and, of course, no remedy in the State Courts, and that the burden of appellees' song to this Court is, "Create us a right and give us a remedy."

The case of Wheeler vs. Insurance Co., 101 U. S., p. 439, which is confidently asserted to have silenced our contention,

simply holds that the lien there claimed is recognized by the Louisiana Code and Louisiana decisions, and must be admitted in a Federal Court of Equity. No one can be found to gainsay this indisputable proposition, assuming that the premise about the Louisiana law was correct, but how is it an authority for the exactly contrary position that a right unknown and denied in Louisiana Courts must still be enforced in a Federal Court of Equity? From what source do Federal Courts of Equity derive the power to trample upon State laws, enacted in pursuance of their reserved rights, guaranteed by the Federal Constitution?

In the case of Riddle vs. Hudgins, 7 U. S. C. C. A. Reports, p. 335, Hudgins & Bro. sold a drove of cattle to Nichols, in Arkansas, and it was verbally agreed that the seller should have an express lien on the cattle for the unpaid purchase price. Nichols removed the cattle to the Choctaw Nation, in Indian Territory, and there died. His administrator took possession of over half the cattle, and upon demand, made by Hudgins & Bro., refused to surrender the cattle or to pay for them. No other creditor of the decedent claimed them, and upon a bill filed in the Federal Court by Hudgins & Bro., it was decided that they had a lien on the cattle to secure their debt.

There is nothing in the record to show that this decision was contrary to a positive statute, and, therefore, this case is no authority for the contention at bar, which is, that a so-called equitable lien can override an express State statute. This case went up from Indian Territory, where a territorial government existed.

In the case of Mississippi Mills vs. Cohn, 150 U. S. 202, it was held that the *jurisdiction* (not jurisprudence) of Federal Courts, sitting as courts of equity, can not be enlarged or diminished by State legislation; and that whether a Federal Court of Equity has jurisdiction over a particular case will be determined by inquiring whether by the principles of common law and equity, as distinguished and defined in this country and the mother country at the time of the adoption of the Federal Constitution, the relief sought in the bill was

one obtainable in a court of law, or one which only a court of equity was fully competent to give. In that case, a creditor's bill in a Federal Court of Equity was maintained, though the remedy in the State Courts was at law.

At this point it would be, perhaps, well to state that, while it is true that Federal Courts of Equity enforce equitable liens in many of the States, it is also true that in all those States, State Courts may, or do, enforce similar liens, and we challenge the counsel for the intervenors to produce a single Federal authority holding that a Federal Court of Equity can enforce an equitable lien in direct contravention of a State law not in conflict with the Federal Constitution or laws.

VI

A pledge is a right, not a remedy, and is so defined by jurisconsults. Markby's Elements of Law, Ch. XI; Sohm's Institutes of Roman Law, Sec. 59; Holland's Elements of Jurisprudence, pp. 201–2.

The latter, in his classification of rights, speaks (p. 148) of it as a private, substantive, normal, antecedent right *in rem*, and it can not be seriously contended that a pledge is one of the equitable remedies which the Federal Constitution and laws are supposed to have stereotyped.

VII.

Assume, for the sake of argument, that the Constitution did adopt a uniform system of Federal equity jurisprudence, supposing that it has been satisfactorily determined which of the thirteen colonial systems of equity jurisprudence was adopted, and that Federal Courts of Equity are exempted from any obligation to follow State laws by virtue of any constitutional restrictions upon their powers, it is still true that the maxim, that equity follows the law, was an integral part of every equity system at that time, and, of course, was as much adopted as any other portion of the system. Every text-writer on equity treats of this maxim, and we refer

to *Merlin on Equity and Equity Pleading, Secs. 110 et seq.; Spence's Equitable Jurisdiction, Vol. I, pages 419–20–21; Pomeroy's Equity Jurisprudence, Vol. I, Secs. 425, 426, 427: Fetter on Equity, pp. 33-4, and note 65*, in which a quaint but forcible decision of Sir Joseph Jekyll is quoted. In that decision he says that in no case does equity contradict or overturn the grounds or principles of the law, as has been sometimes ignorantly imputed to it. This maxim, as applied to the Federal Courts of Equity, requires them to conform to the positive requirements of State statutes in all matters not national in character. Appellees' counsel at a time when they virtually admitted that they had no rights in the State Courts, as shown by the following extract from a brief filed by them in the Circuit Court of Appeals in this case, and, when they relied solely upon the supposed system of uniform Federal equity jurisprudence, argued that the maxim had no application to this case.

"The statutes of Louisiana on the subject of privileges or statutory liens and the decisions of her Courts interpreting those statutes are *entirely impertinent* in this case. They deal with an entirely different subject from equitable liens.

"*Whether the law of Louisiana recognizes or denies equitable liens is a question equally foreign to this case.* The only effect would be to transfer the subject from the *exclusive* to the *concurrent* equitable jurisdiction of the Court.

"If the State law *recognizes* such liens, that would not deprive this Court of the power to enforce them in this case. If it *denies* such liens, that is the original reason why equity creates and enforces them."

Like many other questions of law, this matter can only be determined by a brief historical survey of the subject. One of the most curious and interesting chapters in legal history is the frantic efforts, made by Parliament, at that time composed for the most part of rude and unlettered warriors, in a series of statutes, to abolish the ecclesiastical invention of uses. The chancellors were ecclesiastics, who comprised within their ranks nearly all the learning and scholarship of that age, and they gravely examined the acts of Parliament

to abolish uses, professing that they were as much bound by them as the courts of common law. An examination of these crude statutes by trained intellects always developed the fact that only certain prohibitions were contained in them, and that their effect could easily be avoided by applying the principle of uses to contingencies not provided for by Parliament, and hence not forbidden. The chancellors said: "Parliament has forbidden A, B and C, but has not forbidden X, Y and Z. Therefore, to the latter we will still continue to apply our principles." The binding effect of positive statutes upon Chancery Courts was not questioned even at that early stage in the development of equity jurisprudence.

For a general discussion of this subject see Minor's Institutes, Vol. II, Chap. X, and Spence's Equitable Jurisdiction, Vol. I, pp. 435 *et seq.*

In the nature of things statutes must be obligatory upon courts of equity as well as courts of common law, because it would be contrary to the theory of a government, composed of three coequal and co-ordinate departments, to hold that the department vested with the power to enact laws can not bind all the Courts. No case can be found declaring that courts of equity are not bound to follow positive statutory requirements. If they were not bound they would be vested with power to repeal the law, and thus constitute a power higher than the legislative. It is perfectly true that equity allows rights and enforces remedies outside of the domain of the statutes, but has never openly violated them. The history of uses and trusts proves this assertion.

Blackstone, after enumerating a number of instances of hardship under positive laws which Courts of Equity can not relieve, concludes as follows:

"In all such cases of positive law, the Courts of Equity, as well as the Courts of law, must say with *Ulpian*, '*Hoc quidem perquam durum est sed ita lex scripta est.*' "

Blackstone then continues thus:

"It is said that a Court of Equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a Court of law. Both, for

instance, are equally bound and equally profess to interpret statutes according to the true intent of the Legislature. * * * But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the Courts both of law and equity; the construction must in both be the same, or, if they differ, it is only as one Court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title." Vol. III, marginal page 431.

Merwin, in his work on Equity and Equity Pleading, says, p. 60: "*All positive rules of law*, whether of statute or of common law, are as obligatory upon Courts of Equity as upon Courts of law, whenever the matters to which those rules apply are in question." See also Fonblanque's Equity, Book I, Chap. I, Sec. 3, and Stern et al. vs. Gardner, 20 Ill. 304.

It is, therefore, clear, that courts of equity are bound by the positive requirements of statute law, and we think that we do not misstate the position of appellees' counsel when we say that their contention is, that a uniform system of Federal equity jurisprudence was adopted by the Federal Constitution, but that from that system was eliminated one of its chief maxims—equity follows the law.

This maxim, of course, assuming for the sake of the argument that there is no other obligation resting upon Federal Courts of Equity to follow State laws, has enabled them to conform to the inevitable changes in the rules of substantive law of the various States, while preserving uniformity in the forms of procedure in all the States. Were it otherwise, law would be in a state of continual improvement, owing to the means providing for its amelioration, while equity in the Federal Courts would be unable to modify any of its rules, no matter how urgently required by the exigencies of changing conditions. The law would improve, equity would stagnate and defeat the very purpose for which it originally sprang into being. Let us see how the Supreme Court has construed this maxim.

In the case of *Hedges vs. Dixon County*, 150 U. S. 182,

where the holders of municipal bonds, issued by a county in excess of its authority, tried to invest a court of equity with jurisdiction by offering to cancel so many of the bonds as exceeded the prescribed limit, and to have the residue thereof declared valid and enforced, the Court said, through Mr. Justice Jackson, on page 192, in dismissing the bill: "The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac vs. Thompson*, 15 How. 281, 299," that wherever the rights, or the situation of parties, are clearly defined and established by law, equity has no power to change or unsettle those rights, or that situation, but in all such instances *the maxim, aquitas sequitur legem*, is strictly applicable.'

" *Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract*, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. *Courts of equity can no more disregard statutory and constitutional requirements and provisions than courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provisions, a court of equity can not interpose to give validity to such a transaction or contract or any part thereof.* These general propositions clearly establish that the present bill can not be sustained, and our conclusion, therefore, is that there was no error in the judgment of the court below in dismissing the bill, and that judgment is accordingly affirmed."

Here the Supreme Court declares in emphatic terms that, when a contract is void at law for want of power to make it, a Federal Court of Equity has no jurisdiction to enforce it. Such is the exact case at bar, where the so-called pledge of the unearned sugar bounty to an unascertained amount to secure an unascertained indebtedness is attempted to be enforced, and the pledgees, knowing that they have and never had either a right or a remedy in the State Courts of Louisiana, are seeking for an unconstitutional perversion of Federal power to protect them.

In the case of Ewing vs. City of St. Louis, 5 Wall. 419, the Court says:

"The complainant could ask no greater relief in the Courts of the United States than he could obtain were he to resort to the State Courts. *If in the latter Courts, equity will afford no relief, neither will it in the former.*"

VII.

A doctrine, like a tree, is known by its fruits, and it is indispensable in arriving at a correct decision of any disputed proposition of law to advert to its necessary consequences, and we will now accept the premises of the learned Judge *a quo*, and follow them to their logical conclusion.

The equity jurisdiction of the Federal Courts, meaning the rules of substantive law, was crystallized by the Constitution, as of that date, and can not be changed save by an amendment of that instrument.

The implied mortgage, arising from the deposit of title deeds, was at that time an admitted branch of equity jurisdiction, and, therefore, must now exist. Hence, in defiance of the Louisiana Statute of Registry, a mortgage, perfect as against the world, can, to-day, be created in Louisiana by the simple deposit of title deeds, and enforced in a Federal Court of Equity.

Trusts were another admitted branch of equity jurisdiction, at that time, and, therefore, must still exist. Trusts are inhibited in Louisiana by Art. 1520 of the Revised Civil Code. To-day, in Louisiana, a man may, by act *inter vivos*, or by will, convey property to another in trust for a third person, and the beneficiary can enforce this trust in a Federal Court of Equity sitting in this State. A widow's right to the assignment of dower was then another acknowledged subject of equitable cognizance. Therefore, to-day, in Louisiana, a widow can enforce her right to the assignment of dower in a Federal Court of Equity. Examples might be multiplied indefinitely, but we think that these are sufficient

to demonstrate that the position is wholly untenable. See the Introduction to Adams' Equity, for the grounds of equity jurisdiction, practically all of which existed in 1789. Again, if a Federal Court of Equity is not bound to respect State laws, why can not a chattel mortgage, though unknown to the law of ouisiana, be enforced in that Court?

In each State there must, therefore, be two bodies vested with power to declare the law in matters of State law and local policy, the State Legislature and a Federal Court of Equity, which must declare any State law unconstitutional and void, which in any manner modifies the subjects of equity jurisprudence, supposed to have been adopted by the Federal Constitution.

It may be added, that if this doctrine obtains, the Supreme Court of the United States would better at once enter a decree to the effect that every State statute in conflict with any of the doctrines of this uniform system of Federal equity jurisprudence is unconstitutional, null and void, and leave the States to begin the impossible task of conforming their laws to the new order of things.

The adoption of this doctrine would also mean the vague and indefinite extension of Federal power, and the fiat of the Federal Chancellor would change a government with limited into one of unlimited powers. This is a far stronger objection to the assumption of such power than any *argumentum ab inconvenienti*, for it involves the derangement of our dual system of government, and the reserved powers of the States, guaranteed by the United States Constitution, would be swallowed up in this flood-tide of usurped Federal authority. Finally, even assuming that the position of appellees' counsel is correct, the maxim, equity follows the law, for the first time in the history of the equity system, would be formally abandoned, and a system perfected through centuries of labor would be remitted to that condition of "unbounded discretion" which marked its crude beginnings.

The contract sought to be set up by the intervenors in this suit is a nullity under the laws of Louisiana, and therefore no contract rights could ever have attached. It would seem

very anomalous that a contract, void under an express State statute, and void in the State Courts, could be enforced in the Federal Courts.

We have been unable to find a single decision, overturning a *constitutional State law*, establishing a rule of property, and the provisions of the Civil Code, defining pledges and privileges, and regulating the preferences of creditors, are certainly rules of property.

III. IX.

No one could fail to be struck by the utter inconsistency of the two positions which appellees' counsel advocate. They first claim for their clients a lessor's privilege of the most extensive order, on the ground that the Louisiana statute and decisions, and the sources thereof in the Code Napoleon, give it to them, and that this Court is bound to follow the Louisiana law, no matter how different it may be from the law of every other State in the Union. In the next breath they contend with equal vigor that their clients are entitled to an equitable lien, which is expressly forbidden by the Louisiana statutes and decisions, and insist that the Louisiana authorities must be disregarded, taking for granted that they can not seriously argue for the existence of equitable liens in Louisiana. In one case they vehemently call upon the Louisiana law to save them; in the other case they call with equal vehemence upon a Federal court of equity to save them from the Louisiana law. There is absolutely no difference between the cases, or the efficacy of the two statutes, and both are equally obligatory upon a Federal court of equity.

They have addressed themselves to the engaging task of extending the lessor's privilege in the teeth of the solemn injunction of the Code that a privilege can only be claimed for those debts to which it is expressly granted—to a case never contemplated by the statute, and to the further task of creating a privilege, known as an equitable lien in the common law States, in the teeth of an equally solemn injunction of the Code that lawful causes of preference are privileges and mort-

gages. In one case they want the Court to extend a recognized privilege, and in the other they want a privilege created contrary to the State law.

In conclusion, the value of the Federal system in matters of concurrent jurisdiction with the State Courts depends upon its flexibility and its power to adapt itself to the jurisprudence of each State. The harmonious administration of the same laws in the concurrent jurisdictions is one of the wonders of government, and a perpetual vindication of the wisdom of the framers of the Constitution. Well may we exclaim with Gladstone, as we witness its operation, that the Federal Constitution is the most wonderful instrument that the brain of man has ever devised within a given time.

THIRD.

Second Question.

I.

The third question, which we have just discussed, asks if such an equitable lien, assuming the second question to be answered affirmatively, could be enforced under the laws of Louisiana, so it is plain that the object of the second question is to ascertain whether an equitable lien exists in this case under the general principles of equity jurisprudence without regard to local statutory provisions.

This question would have no point, unless it be assumed that Federal Courts of Equity are vested with the power to enforce a uniform system of equity jurisprudence superior to State laws, and upon this assumption, which, we believe, is demonstrably erroneous, we shall have recourse to the general principles of equity jurisprudence to ascertain the existence, *vel non*, of an equitable lien in this case, and, for the time being, Louisiana law and decisions will be ignored.

Article 13 of the contract, between the Paynes and the Ferrises, contains the following clause: "The balance (of the purchase price of sugar cane), if any, per ton, shall

operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part (the Ferrises) covenant and agree to consecrate solely to the payment of such balance all bounty, *so received by them*, until the whole of the said balance shall have been paid."

After the repeal of the McKinley act, on August 28, 1894, which provided for a bounty to sugar producers, it was agreed, on September 3, 1894, that this article should be extended so as to apply to any bounty that might, thereafter, be granted by Congress to sugar produced from crop of 1894.

This clause contains, first, an attempt to create a conventional lien and privlege, and, second, a promise to pay over the sugar bounty after it has been collected by the promisors. Since this is a Louisiana contract and uses a Louisiana term, privilege, it would seem fair to interpret this portion of it by the Lousiana law, which forbids a conventional privilege, but we do not intend to beg the question, and shall view this contract without reference to Louisiana law.

These two stipulations must be considered together, and since the second provides that the promisors shall collect the bounty, it is clear that under the general principles of equity jurisprudence no lien can be created on an inexistent fund, by the use of the word lien, since the fund, when collected, was to be under the complete control of the promisors, which is incompatible with the creation of a lien.

The agreement was that the Ferrises were to earn, represent and collect the bounty, and after it was so collected, they were then to pay it over to the Paynes. It contains neither an assignment of the bounty nor an attempt at an assignment, and it simply resolves itself into a mere promise to pay a debt out of a particular fund. The Supreme Court in questions of general equity jurisprudence will be controlled by its own decisions, when they have adjudicated the specific point at issue in this case.

The leading case on this subject is the case of Christmas vs. Russell, 14 Wallace, 69. On page 84 the Court say:

"An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor."

The next Supreme Court case on the subject is the case of Trist vs. Child, 21 Wallace, page 441, in which the Court say:

"A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere arrangement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order, or by transferring it otherwise, in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

In the case of Peugh vs. Porter, 112 U. S. 737, the Court, on page 741, say:

"Apart from the merits, objection is made to a decree in favor of Peugh, on the ground that he has no equitable lien on the fund in controversy, within the decisions in Wright vs. Ellison, 1 Wall. 16, and Trist vs. Child, 21 Wall. 441, 447. The rule as declared in the first of these cases is, that it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it" (1 Wall. 22).

And in that case, after laying down the principle, it was held that there were words of express transfer and assignment of the fund in dispute.

In Hare and Wallace's Notes to Leading Cases in Equity, Vol. 2, part 2, page 233, it is said:

"A covenant on the part of a debtor to apply a particular fund in payment of a debt, as soon as he receives it, will not operate as an assignment, for it does not give to the covenantee a right to the fund save through the covenantor, but looks to a future act on his part, as a means of rendering it effectual."

The rule laid down by the Supreme Court in Christmas against Russell has been frequently followed by the State Courts. In the case of Fairbanks vs. Sargent, 104 N. Y., page 108, the Court say:

"The test (of an equitable assignment) is an inquiry whether the debtor will be justified in paying the debt, or the portion contracted about, to the person claiming to be the assignee."

In the case of Silent Friend Mining Co. et al. against Abbott et al., 42 Pacific Reporter, 318 (Colorado), the Court say:

"A promise to pay a debt out of proceeds of ore to be mined is not an equitable assignment. There are no words in this agreement which could operate to transfer, or even indicate an intention to transfer any specific fund, or any interest in any specific fund to the plaintiffs, nor was there any right so conferred upon the plaintiffs to receive the money, except that it might be paid to them by the company. * * * It was simply agreed by the company that when it received the money it would apply it in the payment of the debt, and, until it should do so, no title in the money could pass to the plaintiffs.

"If it failed in the fulfilment of its promise the plaintiffs' remedy was by an action of law against the company for breach of contract" (quoting Christmas vs. Russell, and Trist vs. Child).

In Jones on Liens, Sec. 48, the rule is stated to be:

"A mere agreement, whether by parol or in writing, to pay a debt out of a designated fund when received, does not give an equitable lien upon that fund nor operate as an equitable assignment of it (quoting Christmas vs. Russell, Trist vs. Child and other cases), and the agreement is personal merely. There must be an order, or something there, to place the cred-

itor in a position to demand or receive the amount of the debt from the holder of the fund without any action on the part of the debtor; something that would protect the holders of the fund in making payment. The covenant by a debtor to pay certain debts out of a particular fund, when the same should be received, is merely a personal covenant."

In Sec. 51, the same author says:

"The rule that an equitable assignment can be effected only by a surrender of control over the funds or property assigned is one that is strictly held to." Authorities, from both adjudged cases and text writers, might be multiplied, but these are ample.

There can be no doubt that under the decisions of the Supreme Court the contract in this case does not constitute an equitable lien in favor of the promisee. The rule is inflexible in requiring the promisor to so part with control over the fund as to enable the promisee to collect it directly from the debtor and not through the agency of the promisor.

The courts long ago recognized the fact that a man can not be compelled to specifically execute every promise, and, if a mere promise to pay a debt out of a particular fund, when collected by the promisor, were susceptible of specific execution in courts of equity, they would be flooded with a deluge of litigation, the like of which was never known since the world began.

If litigants do not protect their rights by taking assignments which the courts recognize, they can not invoke judicial aid.

It is argued that the clause of the contract that the balance of the purchase price should operate as a lien and privilege on the bounty money creates a lien and privilege. This clause of the contract ceased to have any effect after the repeal of the bounty act, on August 28, 1894, but in anticipation of a Congressional appropriation for bounty upon the crop of 1894, it was stipulated, on September 3, 1894, that this clause should apply to any bounty that should, thereafter, be granted on this crop. The bounty was not then in existence, and it was doubtful whether it ever would be, and,

therefore, it was impossible to create a lien upon a non-existent fund. The right to a claim accruing *in futuro* may under certain circumstances be assigned, but there can be no lien created upon such a fund by convention, independently of any assignment, especially when the contract itself provides, as in this case, that the promisor was to collect the fund, as to which the attempted lien is stipulated.

Counsel for the appellees seem to think that the mere employment of the terms "shall operate as a lien and privilege," create an equitable lien, even though the very next clause of the contract shows how the parties themselves construed this language in providing that the promisor should collect this money. This negatives the idea of an assignment.

The decree of the Circuit Court allowed an equitable lien on the bounty money *collected on sugars made from cane sold by the Paynes*. The contract provided for a privilege on the *first* bounty money received by the lessees, no matter whether it was collected from sugars made from cane sold by the Paynes, or some one else, but the Court has endeavored to restrict this privilege as stated. This decree does not conform to the contract of the parties, and a Court can not make a contract for them, especially where the rights of third persons have intervened, but must enforce the contract as it is. If it is invalid, it can not be modified by a Court into validity.

II.

There is another question which we wish to briefly discuss, and that is, whether under the circumstances of this case, the bounty of 1894 was assignable.

Section 3477 of the Revised Statutes of the United States is as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration thereof, and all powers of attorneys, orders or other authorities for receiving payment of any such

claim, or any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

This statute has been repeatedly construed by the Supreme Court, but it is unnecessary to review all of the decisions.

In the case of Goodman vs. Niblack, 102 U. S. 556, the Court say:

That the mischiefs intended to be prevented by this statute are mainly two:

1. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who is a stranger to the original transaction.

2. That by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influence in prosecuting the claim before the departments, the Courts, or Congress, as desperate cases, when the reward is contingent on success, so often suggest.

In the instant case the agreement in reference to the assignment of the bounty was made on September 3, 1894, after the bounty act had been repealed, and, therefore, it is clear that it was an attempted transfer of a claim against the government, prior to its allowance. This claim was not allowed until Congress appropriated some money in an act passed March 2, 1895, for the payment of the bounty on the sugar crop of 1894.

It can not be true that this claim could be validly assigned, prior to its allowance, because one of the very mischiefs which the Supreme Court has pointed out that the statute, forbidding the assignment of claims against the United States government, was designed to remedy, was to prevent improper influences from being brought to bear upon Congress to allow the claim assigned. If this was a valid assignment, any speculator, after the repeal of the bounty act on August 28, 1894, might have bought up hundreds of thousands of dollars of bounty claims against the United States government, and might then have besieged Congress to pass an act allowing these claims, resorting to all the corrupt methods which the Supreme Court stated in the case of Trist vs. Child, 16 Wallace, 441, might be employed to effectuate the purpose. If the statute does not apply to a case like the instant one, it can not apply to an assignment of any claim but one in which a lobbyist is to receive a portion of the proceeds of an appropriation, secured by him from Congress to pay the claim represented by him.

We think, therefore, that under this statute it was beyond the power of the Ferris Company to make an assignment or transfer of this unsettled claim against the United States, which could only be secured by a congressional appropriation.

We submit that all three questions should be answered in the negative.

Respectfully submitted,

WALTER H. SAUNDERS,

Of Counsel for John H. Murphy, Intervenor and Appellant

No. 722.

SUPREME COURT OF THE UNITED STATES.

THE BURDEN CENTRAL SUGAR REFINING CO. ET AL.,

versus

JACOB U. PAYNE ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR J. U. PAYNE ET AL., APPELLEES.

CHAS E. FENNER,
Solicitor for Payne et al., Appellees.

No. 722.

SUPREME COURT OF THE UNITED STATES.

THE BURDEN CENTRAL SUGAR REFINING CO. ET AL.,

versus

JACOB U. PAYNE ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR J. U. PAYNE ET AL., APPELLEES.

The certificate contains a statement of the facts, and of the questions certified.

I.

The first question certified is the following:

"It being shown that the cane sold by appellees, J. U. Payne et al., to the Ferris Sugar Mfg. Co., Ltd., pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to Ferris Sugar Refining Co., Ltd., are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessors privilege to secure the payment of the purchase price of such cane?"

This presents a pure question of Louisiana law and will be determined by this Court according to the provisions of the

Civil Code of Louisiana and the interpretation thereof by the Supreme Court of the State.

The Code clearly recognizes that a lease may impose other obligations on the lessee besides a mere obligation to pay the stipulated rent, and grants the lessor's pledge and privilege, not only for the payment of the rent, but also for the performance of *all other obligations* of the lease.

Article 2805 is clear: "The lessor has for the payment of his rent *and other obligations* of the lease a right of pledge on the movable effects of the lessee which are found on the leased property."

The transcript of the appeal is sent up with the certificate, and at page 131 thereof, will be found the decree of the Judge of first instance.

He finds, "that the contract entered into on June 16th, 1892, * * * is a contract of lease, and the obligations thereof are obligations of the lease, and are secured by the lessor's lien and privilege."

Under the law as above stated, if the finding of the Judge is correct, the conclusion sustaining the privilege cannot be questioned.

The contract is copied in full in the certificate. We ask the Court to read it carefully. In our briefs before the Circuit Court of Appeals, which are sent up with the certificate, we have analyzed this contract and we will not repeat this analysis. The questions are: (1) whether the contract is a contract of lease, (2) whether the obligations thereof are obligations of the lease?

Consider the plain facts of the case.

The Ferris Company was a corporation organized for the purpose of manufacturing syrup or sugars from cane. They required a sugar-mill for that purpose.

The intervenors were owners of plantations devoted to the raising of cane. They had a sugar-mill on their plantations on which they ground their cane, and without which they had no means of utilizing it. The Ferris Company proposed to lease their mill *on certain conditions.*

The intervenors were willing to lease it *on certain conditions.*

What were these conditions?

The Ferris Company said:

"We are willing to lease your mill, but it would be useless to us unless we can get cane to grind on it; therefore, you must *bind* yourselves by an obligation of the lease itself, to cultivate your plantations in cane, and to deliver the cane to us to be taken off on the mill."

The intervenors replied:

"We are willing to lease our mill to you, and to bind ourselves to cultivate our plantations in cane, but we cannot do this unless we are made secure that our cane shall be received by you and taken off on the mill leased; therefore you must bind yourselves by an obligation of the lease itself, to receive and take off on the mill the cane raised by us and to pay us its value as fixed by the terms of the contract."

Such were the self-evident motives and foundation of the lease.

Accordingly we find the following distinct obligations embraced in the lease: The intervenors bound themselves (1) to cultivate *all* their plantations in cane; (2) to deliver *all* cane raised to the mill.

The Ferris Company bound itself (1) to receive and take off on the mill *all* the cane raised by intervenors; (2) to pay intervenors the value thereof as fixed by the terms of the contract.

The lease, in its first article, declares that it was made "*upon the terms and conditions hereafter provided;*" and, in its last article, declares "that this is an *entire contract, each* stipulation and obligation herein being a part of the *consideration* of *every other.*"

The simple question for your Honors to decide is whether these obligations are "obligations of the lease."

Can the question admit of serious discussion? Each one of these obligations is declared to be a *consideration* of the lease, as much so as the *rent* on the one hand, or *the use of the thing leased* on the other."

Why, these obligations belong to the very *object* of the contract as defined in the Code, Art. 1883:

"Every contract has for its *object* something which one or both of the parties oblige themselves to give, or to do, or not to do."

They are equally part of the *cause* of the contract under Art. 1896.

"By the *cause* of the contract is meant the *consideration* or *motive* for making it."

Suppose either party had failed to comply with any one of these obligations, could he have claimed performance of any obligation by the other? And would not his failure have authorized the other party to dissolve the lease?

Suppose intervenors had failed to cultivate their plantations in cane or to deliver their cane to the mill, could they have claimed *rent* from the Ferris Co.? And would not the Ferris Co. have had the right to dissolve the lease under Art. 1926 of the Code? Obviously, and *why?* Because it would have been "a breach of the obligation" of the lease?

Would not the same consequences apply to the breach of their correlative obligations by the Ferris Co.?

Much is sought to be made of the use of the words *purchase* and *sale* in the contract. But words cannot alter substance, and the *substance* of the obligations is, plainly, as above set forth.

The attempt to sever any of these obligations from the lease s impossible of success. All the obligations are *terms and*

conditions of the lease, so expressly declared in the first article thereof, which says: "The parties of the first part grant to the parties of the second part, *upon the terms and conditions hereafter provided*, a lease, etc."

Amongst these terms and conditions are:

1. The lessors bind themselves to cultivate their plantations in cane, and to deliver the same to the lessees at the sugar house. (Articles 7 and 8 of contract.)

2. The lessees bind themselves to receive the cane (Article 9), and to pay for the same at the rate, at the times, and in the manner stipulated. (Articles 11, 12 and 13.)

That the terms and conditions stipulated in a contract are obligations of the contract is a legal proposition which will hardly be disputed. And it is difficult to perceive any grounds on which a contract of lease can be excepted from this universal principle.

We submit that it is *luce clarior* that the obligations to receive and pay for the lessor's cane were terms and conditions on which the lease was granted, and that they are visceral obligations of the lease on the fulfilment of which the existence and continuance of the lease depended, and breach of which would immediately entitle the lessors to dissolve the lease. The Judge of the first instance was therefore right in finding that the contract was a lease, and that the obligations were obligations of the lease.

It is perfectly settled by the Supreme Court of the State that the lessor's pledge secures not only the rent but also the loss or damage resulting from the breach of *other obligations* of the lease. In the case of Warfield vs. Oliver, 23 An. 612, the lessor asserted his privilege for rent and also for $5000 damages occasioned by the failure of the lessee to perform

other obligations of the contract of lease. We quote from the decision:

"The defendant moved to dissolve the writ of sequestration on the ground that there was no privilege for the claim of $5000 for the non-performance of the obligations of the lease (other than that to pay rent), the same being for damages not liquidated. * * As to this ground, the lessor has, for the payment of his rent *and other* obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased, etc. Civil Code 2705. The *other* obligations of this lease, involved in this discussion, *sprung from Oliver's agreement in that instrument to put the plantation in repair and to keep it in repair.* As will be seen by the evidence in the record, this obligation was of great importance, and we see no reason to decide that it was not secured by the right of pledge above mentioned."

In another and very recent case, the lessee had agreed in the contract of lease to pay five *per* cent. attorney's fees on the rent notes in case suit thereon should become necessary. The question arose whether such a stipulation was an obligation of the lease and secured by the lessor's privilege—and the Court held that it was. Henderson vs. Meyer, 45 An. 791.

The same was held in Foy vs. McKee, 31 An. 67.

These decisions cover and sustain our right to the lessor's privilege so clearly that they should exclude further discussion. They also silence a contention made by learned counsel in the lower Court to the effect that the "other obligations" mentioned in Art. 2705, of our Code only referred to such implied obligations as were imposed by the Code on the lessee in the absence of contrary stipulation, as defined in Articles 2710, *et seq.* Who would contend that the obligations which were granted the lessor's privilege in the above cases arose from any implication or provision of law or from anything except the conventional stipulations of the parties? Obviously, no provision of the Code implied any such obligations. As the Court expressly said in the case of Warfield vs. Oliver, the

obligations there enforced "sprung from Oliver's *agreement* in the lease to put the plantation in repair and keep it in repair."

Indeed, a lease is a contract, and when the Code uses the terms, "obligations of the lease," it necessarily means the obligations of the contract between the parties.

The only things *essential* to the contract are the price and the *use* of the thing leased. As to the amount of the price and the terms on which it shall be paid, and as to the *use* of the thing and the terms, modes and conditions according to which the thing shall be used, as to everything, in fine, which concerns the execution of the lease; those are matters entirely subject to the consent of the parties, as expressed in the contract, and on these subjects they may validly make any stipulations which they see fit, and such stipulations are binding obligations of the lease.

In the absence of such stipulations, there are obligations on the part of the lessor and the lessee which the Code implies, but these implications only arise when the contract is silent. The parties by their contract may exclude, limit or modify, as they please, these implied obligations, and may substitute other and different obligations on the same subjects according to their will. We concede, as the counsel claims, that if obligations were inserted in a lease having no relation to the price or to the use of the thing leased, or to its execution, such obligations would not fall within the meaning of the terms "obligations of the lease," because they would be entirely foreign to the nature of the contract, but we do contend that any stipulations in the contract having direct relation to the *use* of the thing leased, and to the execution of the lease, are as much obligations of the lease as the obligation to pay rent or any obligation which the law would imply in the absence of such stipulations.

We have demonstrated that all the obligations in this contract, for the breach of which we claim indemnity, are obligations directly concerning and regulating the rights of the parties with reference to the *use* of the thing leased and the execution of the lease, and, indeed, are so essential to, and so closely connected with, a lease of the character of that hereinvolved, that, without such obligations, no such lease could ever have been entered into.

Your Honors are well aware that the Civil Code of Louisiana is a derivative system of law, modeled and founded on the Code Napoleon of France. It has been truthfully said:

"While there are numerous substantial modifications and changes, the student of our Code will discover that the vast majority of the new articles are mere enunciations of the conclusions which had been reached by the French Courts and commentators in the construction and interpretation of the Napoleon Code. The work has but slight pretensions to originality, and must be considered as a substantial reproduction of the Napoleon Code expanded by the exposition of the French jurists and altered in some respects to conform to the circumstances aed relations of the people."

Cross on Successions Introduction, p. xxv.

Hence, the great weight as authority which the Courts of Louisiana have always given to the decisions and opinions of the French Courts and commentators in the interpretation of provisions of our Code corresponding to those of the French Code.

The first Code of Louisiana, that of 1808, only granted the lessor's privilege to secure the stipulated rent. Code of 1808, Art. 74.

Judge Martin, in his history of Louisiana, tells us that although the Napoleon Code had been promulgated in 1804, in those days of slow and imperfect communication, no copy of it had yet reached New Orleans. The framers of the Code of 1808 availed themselves, however, of the *project* of the

work which they possessed, and embodied large portions of it in their report. Martin's History of Louisiana, p. 344. It is probable (though we have not had the means of verifying the fact), that this *project* only granted a like privilege. We know what extensive alterations were made in the *project* before final adoption of the Napoleon Code.

The framers of the Code of 1825 had great advantages over the authors of the Code of 1808. Not only had they the Napoleon Code as finally adopted, but they had the advantage of the jurisprudence of France during twenty years in its administration and construction. They found that Article 2102 of the French Code, after granting the lessor's privilege for rent, further provides:

"The same privilege takes place for tenantable repairs and *for everything which concerns the execution of the lease.*"

With this provision before them, the framers of our Code adopted Article 2705 of our Code, granting the privilege not only for the rent, but for all "other obligations of the lease."

Obviously they, *ex industria*, changed the provision of the Code of 1808 and abandoned the restriction which confined the privilege to the rent, and adopted the principle embodied in the French Article. Instead of using the language of the latter, "*for everything which concerns the execution of the lease,*" they employed the simpler and broader terms, "*other obligations of the lease.*" The latter terms are surely broad enough to cover all obligations which "concern the execution of the lease;" for if obligations which "concern the execution of the lease" are not "obligations of the lease," what obligations other than the rent can become so? It seems to us self-evident that there is no substantial difference between the two articles, or that, if there is any, our article is the broader of the two.

We, therefore, appeal with confidence to the French authorities as fully applicable to our law and as confirming the interpretation placed by our own Supreme Court thereon. Pont, in his continuation of Marcadé's work, says:

"The lessor's privilege has for its object to secure the execution of the lease; therefore, the privilege should guarantee every debt resulting from the contract of lease. Thus, the privilege is granted, according to the text: 1st, for the rent, etc.; 2nd, for locative repairs, and 3rd, for everthing which concerns the execution of the lesse. * * * The privilege secures the execution of the lease; hence, it exists for locative repairs, for detoriations occasioned by the fault of the lessee, for things furnished (*fournitures*) by the lessor in virtue of a clause of the lease, and in general for all advances made for *exploitation* (meaning the working of the thing leased)."

10 Marcadé & Pont, Nos. 124 and 125.

The cane, for the price of which the privilege is claimed, was *furnished* by intervenors to the lessee of this mill, under the obligations expressly imposed by the lease, and was obviously intended to aid the lessee in the working of the mill by furnishing the cane, without which it could not be operated.

Laurent, in commenting on the French article, says:

"By *execution of the lease* we understand all the obligations which the law *or the contract* imposes on the lessee; those which the law establishes are considered as agreed between the parties; all, therefore, concern the execution of the contract. * * * Advances which the lessor makes under the contract of lease to the lessee, are they guaranteed by his privilege? The affirmative is adopted by the doctrine of jurisprudence. It is incontestable when the advances concern the lease; that is to say, the rights and obligations which result from it. In this case the letter and spirit of the law are applicable. But if a loan of money were made to the lessee in the contract oflease without there being any relation between this loan and the iease, this would no longer be an advance; it would be merely an ord nary loan, and the law gives no privilege for a loan. Jurisprudence adopts this view; for if it accords a privilege to the lessor for advances which he makes, it is only because such advances *concern the lease. A master of forges binds himself to furnish to a lessee of his factory the wood necessary to run it; it has been adjudged that such an advance is privileged;* the same is the case *in furnishing of beets which the lessor makes to the lessee of a sugar factory.* The lessor furnishes 10,000 fr. to the lessee of a mill *as a fund for its operation.* This has for its object the execution of the lease; therefore, it is privileged." 29 Laurent, Nos. 406-407-408.

We shall not encumber this brief with further quotations from the French commentators who are in accord on these questions.

It happens that France not only has the same law with our own, but also has a sugar industry similar to that of Louisiana, under which leases of the character of that here involved are not infrequent. We have had the good fortune to discover a decision by the highest Court of France in a case absolutely identical with the one at bar. The facts appear on the face of the decision. The owner of a beet-sugar farm had leased the mill thereon. A clause in the lease bound the lessor to cultivate his land in beets and to furnish and deliver the products to the lessee at the mill, for which the lessee was to pay the agreed price of 16 fr. per 1000 kilogrammes of beets delivered. The lessor delivered the beets, and the lessee failed to pay the price, which remained due. The lessor claimed the lessor's privilege for the rent, and also for the price due for the beets delivered. Could two cases be more identical? We transcribe the decision of the French Court of Cassation:

"Considering; that, as to the debt of 6800 fr. rent and rent charges, the privilege of Decocq is not contested and is, besides, expressly established by Art. 2102 C. C.; that according to Sec. 1 of said Article, the same privilege is granted for repairs and for all that 'concerns the execution of the lease;' That it is by virtue of a clause of the lease; and for the execution of this clause, and to assure the operation of the mill leased, that the Messrs. Decocq have delivered and furnished to Blanquart beets to the value of 8086 fr.; That articles nine and following of said lease obliged them to cultivate beets on 53 hectars and 19 acres, and to furnish and deliver at the mill the whole product thereof at the price of 16 fr. per 1000 kilogrammes of beets, and under a penalty of 150 fr. damages for each 35 acres of beets not delivered; That all the authors and jurisprudence accord the privilege of Art. 2102 to the lessor who has made advances and furnishings, when they are made, as in this case, in virtue of a clause of the lease and in execution of the lease;—Held: That under Art. 2102, the debt due Messrs. Decocq, fixed at 14,886 fr. is privileged, as well for the beets furnished, as for the rents and rent charges, and consequently the seizure is maintained, etc."

Sirey, 1851, 2nd part, p. 77.

It is not often that a decision can be found so precisely in point under laws which cannot be distinguished.

The learned Judge who decided this case in the Court below is a skilled civilian, bred under the Louisiana Code, and who passed to the bench of the United States from a seat on the Supreme bench of the State of Louisiana.

He was furthermore reared in the sugar district of the State and was familiar with the necessary relations and conditions attending the execution of such contracts as the one here present.

He was thus, in every way, peculiarly qualified to deal with this case and to reach correct conclusions as to the interpretation of such a contract and of the law applicable thereto.

At the time when Judge Parlange rendered his decree, he reserved the right to prepare and file a written opinion. He had not done so up to the time when the appeal was taken, and, therefore, it was not embodied in the transcript. He filed it, however, before the case was argued in the Court of Appeals and it was before the Judges of that Court. A copy of his opinion will be found in our original brief filed before the Circuit Court of Appeals, but for convenience of your Honors, we file with this brief, several additional copies. On this question, we believe this Court will find it to be a legal demonstration of the correctness of his decision sustaining our lessor's privilege.

We confess our inability to perceive the pertinency or force of the fact stated in the certified question, that the cane "was grown on lands not within the limits of the premises leased." Cane is not and cannot be grown on premises occupied by a sugar-mill.

The *lease* obligated the lessors to cultivate their contiguous

plantations in cane and to deliver the cane to the lessees to be taken off on the mill, in order to supply material for the operation of the mill, and the *lease* obligated the lessees to receive, take off and pay for the cane so raised. These correlative obligations were vital conditions of the lease, without which it would never have been entered into, and failure to perform either by one party would have released the other from *all* obligations and given him a right to dissolve the lease. If the lessors had failed to cultivate the cane and to deliver it at the mill, would the lessees have been held to pay the rent? If the lessees fail to receive and pay for the cane, would they have the right to maintain their possession and use of the thing leased, and would not the lessors have the right to dissolve the lease and eject them from the premises?

To say that such obligations are not "obligations of the lease," because the cane was not raised on the leased premises, seems to us a contradiction in terms.

Much stress is laid on the use of the words "purchase" and "sale" in the contract, and it is claimed that obligations to *purchase* and *sell* cannot be imported into a lease. Why not? We might admit it to be true, if the proposed purchase and sale was independent of, and disconnected with, the execution of the lease. Then, the distinction made by Laurent and quoted above would apply. But where, as in this case, the obligations are vital to the existence and execution of the lease, they are properly obligations of the lease and should be enforced as such.

Thus, in the case of Warfield vs. Oliver (cited above), the lessee bound himself "*to put in repair*" the leased plantation, an obligation so onerous that $5000 damages were claimed for its breach.

Counsel says this "bore upon the obligation to do repair which, in default of conventional provisions, the Code itself particulaly regulates." Why, an obligation on a lessee *to put the thing leased in repair* is as foreign to the law governing leases as anything that can be conceived of. The utmost obligation which the *law* imposes on the lessee is to return the thing leased *in like good order as received*, and, for that purpose, to make the minor repairs, rendered necessary "during the lease," recited in Art. 2716 of the Code. The obligation "to put in repair" a leased plantation is a simple *contract for work and labor*, quite as different from a lease as a contract of *sale*. And yet, the Supreme Court held, that if the obligation to perform such a contract was inserted in a lease as part of its consideration, it became an "obligation of the lease," and was secured by the lessor's privilege.

The contention is, moreover, completely silenced by the French decision cited above, where, in a case *identical* with this in every particular, in which the lessee of a sugar-mill bound himself to receive cane raised by the lessor and to pay a fixed price therefor, the Court of France held that the obligation to pay the price was an obligation of the lease secured by the lessor's privilege.

In conclusion, we would say that if our lessor's privilege be allowed, it is ample to satisfy our entire claim, and ends our pecuniary interest in the case.

But, *ex abundante cautelâ*, we will fully argue the other certified quesrions.

II.

The second question is:

"Under the terms of the 13th Article of the contract between the Paynes and Ferrises, and to secure the payment of the price of the sugar cane sold and delivered under said contract, have the appellees an equitable lien upon the bounty money collected from the United States by the receiver in this suit?"

We understand this to raise the simple question whether, under the terms of the contract and under the principles of equity jurisprudence, considered independently of the effect of any State legislation, appellees are entitled to the lien claimed.

The lien is claimed under Article Thirteen of the contract, which provides that the unpaid balance due for cane delivered "*shall operate as a lien and privilege to the full extent of such balance* on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance, all bounty payments so received by them until the whole of said balance shall be paid."

At the time when the original contract was passed, the McKinley Bounty Act was in force, but after that act had been repealed and before the crop of 1894 was ready for delivery, it was agreed between the parties that "the provisions of Articles 11 and 13 of the contract should be extended so as to apply to any bounty which might thereafter be granted by Congress to sugars produced from the crop of 1894." (See certified statement of facts, p. 9).

Subsequently congress passed an act allowing bounty on the crop of 1894, and the bounty here in controversy was collected by the receiver on sugars made from cane of intervenors.

A clearer case of an equitable lien by express contract could not be presented. We are before a Court of Equity. A Court of Equity will enforce such liens. The fact that no statute law of Louisiana confers such a lien, far from being a reason why a Court of Equity should not enforce it, is the very reason why equity does not grant and enforce it. We quote from a decision of the Circuit Court of Appeals for the 8th Circuit:

"The lien, which was created by agreement of the parties to this case, is called an 'equitable lien' or an 'equitable mortgage.' It is said equitable liens by contract of the parties are as various as are contracts which parties may make. 1 Jones' Liens, Sec. 27. Such liens do not depend upon the possession of the property by the creditor, as do liens at law. Nor do they depend upon any statute for their force and efficacy, and they are not affected by the registration laws. They are founded upon *the contract* of the parties, which may be either verbal or in writing, and they will be enforced in equity against the party himself and his personal representatives, heirs, voluntary assignees and purchasers, with notice. The law gives no remedy by which such liens can be established and enforced. Being an equitable lien, the enforcement of it is exclusively within the province of a Court of Equity."

Riddle vs. Hudgins, 7 U. S. C. C. A. Reports, p. 337.

"Remedies in equity, as well as at law," says Mr. Pomeroy, "require some primary right or interest of the plaintiff which shall be maintained, enforced or redressed thereby. When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the Court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of 'equitable liens' supplies this necessary element, and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing."

Pomeroy, E. G. Jur. Sec. 1234.

See on same subject, 1 Jones on Liens, Sections, 27, 28, 42 63, 65, 66, 93 and 94.

An assignee in bankruptcy, and *a fortiori* a receiver, is regarded as a volunteer against whom a lien continues in force.

"In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only upon real estate, but also upon personal estate or upon money in the hands of a third person, whenever the lien or other claim is a matter of

agreement, against the party himself and his personal representative and against any person claiming under him voluntarily or with notice, and against assignees in bankruptcy, who are treated as volunteers, for every such agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts.

Fletcher vs. Morey, 2 Story 555-56; 1 Jones on Liens, Section 93.

The fact that the bounty in this case, on which the lien is claimed, was only a thing *in posse* and *in futuro* does not affect the case.

"Whenever a positive lien or charge is intended to be created upon real or personal property not in existence or not owned by the person who grants the lien, the contract attaches in equity as a lien or charge upon the particular property as soon as he acquires title or possession of the same. An equitable lien upon future property may be even more effectual than such a lien upon property in existence, for the registration laws apply to liens upon property in existence, but not to liens upon future property. Therefore, it happens that, while, as against creditors, a lien cannot be created by consent upon a personal chattel in existence at the time of such contract without registration, yet, as this rule does not apply to a contract in regard to future property, a lien effectual as against creditors may be created by agreement upon future property, such, for instance, as the products of a farm or the profits of a farm not then in existence."

Jones on Liens, Sec. 42, and authorities there cited.

Equitable liens are either *express*, *i. e.*, conferred by the terms of express contract, or *implied*, *i. e.*, declared by a Court of Equity, out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings.

"An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a Court of Equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. Equitable liens by contract of the parties are as various as are the contracts which parties may make."

1 Jones on Liens, Sec. 27.

We are claiming here an *express* equitable lien under the

specific agreement that any unpaid balance due for cane delivered "shall operate as a lien and privilege" on the bounty. *Express* equitable liens are those which arise from an express contract, declaring, in so many words, that the lien shall exist. All others are implied equitable liens, including those arising from orders and assignments.

Thus, Mr. Jones (1st Jones on Liens, Sec. 27) says, after defining equitable liens created by express contract, and saying that these may be as various as the contracts which parties may make: "All *implied* equitable liens, those arising by *orders and assignments*, those arising from advances made and money paid for others, those arising from agreements to give mortgages, and those arising in favor of creditors and stockholders of a corporation, are also treated of in the present chapter," showing clearly that all equitable liens which are not *expressly* stipulated in the contract, are *implied* equitable liens.

We are not claiming any *implied* equitable lien resulting from any assignment, or order, or agreement to pay out of this fund. We claim our lien because it was *expressly* agreed between the parties in the contract that we should have such a lien. 1st Jones on Liens, Sec. 27.

No case has been, or can be, cited in which a Court of Equity has ever denied an equitable lien to a party where he presented a contract, by the terms of which such a lien was expressly granted.

We challenge the production of such a case with perfect confidence that none such can be found.

All the authorities quoted by appellants will be found to apply only to *implied* equitable liens, involving questions as to whether an equitable lien was *implied* from particular stipula-

tions in contracts which did not *expressly declare* that they should operate a lien.

Take, for instance, the Ingersoll case, 89th N. Y., 513, which was the leading authority relied on.

The Court will find in reading the case that no *express* lien is stipulated in the contract. The question was simply whether such a lien was *implied* from the agreement, and the Court found that it was not. The distinction between the two cases is illustrated in the case of Birley vs. Gladstone, 3rd M. & S., 205, referred to by Mr. Jones in Section 31, 1st Jones on Liens. Mr. Jones says:

"Thus a clause in the charter party whereby the freighter bound the goods to be taken on board for the performance of every covenant therein contained does not give the owner any lien in equity on the goods brought home in the ship, either for dead freight or for demurrage which became due by virtue of the charter party. *The ground of the judgment was not that a lien might not have been contracted for, but that the clause of the charter party did not contain a contract to that effect.*"

If the clause had expressly stipulated that there should be a lien, the Court would have awarded it, but in the absence of such stipulation, it refused to imply a lien.

Such cases involve no question of the *power* of the parties to create a lien, but only whether they *intended* to grant a lien and whether such intention can be *implied* from the terms of their stipulations. When, as in this case, the stipulation *expressly* declares, *totidem verbis*, that the lien is granted, all questions of *intention* and *implication* are excluded. To place the matter in a clearer light, let us recur to Article xiii of our contract. The article first declares that the unpaid balance "shall operate as a lien and privilege on the bounty, etc.;" and then it proceeds: "and the parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them until the whole of

such balance shall be paid." Now if the first clause were eliminated and we were claiming a lien solely by virtue of the last clause, that would raise a question of *implied* lien, i. e., whether the parties could be held to have intended, by such a stipulation, to create a lien; and the authorities presented by appellant might have some application. But we claim our lien under the first clause, and that absolutely excludes all such questions.

We submit that, under the foregoing principles and authorities, this question will be answered in the affirmative.

III.

The third question is as follows:

"If the second question be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Manufacturing Company?"

Courts of Equity have, from time immemorial, recognized and enforced such equitable liens, and Courts of the United States sitting in equity in the State of Louisiana have the unquestionable right and duty to recognize and enforce such a lien, *unless its power and duty to do so can be and has been taken away by the statutory law of the State of Louisiana.*

The contention of the appellants rests upon two propositions, failure to maintain *either* of which would be fatal to the contention, and *both* of which, we maintain, are absolutely unfounded.

These propositions are:

1st. That State legislation *can* take away the jurisdiction of Courts of the United States to recognize and enforce equitable liens.

2d. That the statutory law of the State *does* forbid the recognition and enforcement of equitable liens.

We will consider these propositions in order and separately.

(1.)

Mr. Pomeroy, after defining the nature and origin of equity jurisdiction, proceeds to classify the jurisdiction as being either exclusive or concurrent.

The exclusive jurisdiction, he says, embraces:

"*First.* All civil cases in which the *primary right* violated or to be declared maintained or enforced, whether such right be an estate, title or interest in property, or a *lien* on property, or a thing in action arising out of contract, is purely *equitable* and *not legal;* a right, title, estate or interest *created* by equity and not by law. * * *

"*Secondly.* All civil cases in which the remedy to be granted, and, of course, the *remedial* right, is purely *equitable,* or one which is recognized and administered by Courts of equity and not by Courts of law."

Id. §§ 137-138.

"The *concurrent* jurisdiction embraces all those civil cases in which the primary right, estate or interest of the complaining party sought to be maintained, enforced or redressed, is one which is cognizable by the law, and in which the remedy conferred is of the same kind as that administered, under the like circumstances, by Courts of law, being ordinarily a recovery of money in some form. The primary right, estate, title or interest, which is the foundation of the suit, must be *legal* or else the case would belong to the *exclusive* jurisdiction of equity, and the law must, through its judicial procedure, give *some* remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate and complete. The fact that the legal remedy is not full, adequate and complete, is, therefore, the real foundation of this *concurrent* branch of the equity jurisdiction."

Pomeroy Eq. Jur., § 139.

In defining the subjects which are embraced in the exclusive equity jurisdiction, Mr. Pomeroy expressly includes the recognition and enforcement of what are called "equitable liens." Id. § 165.

This is done with manifest propriety, because the *primary right* and the *remedy* for its enforcement are both *created* exclusively by equity, and are *not* recognized at law; and, indeed, as abundantly shown by the authorities cited in our original brief, the fact that the law does not recognize such liens is the very reason why equity grants and enforces them.

What then can be the force or bearing of arguments going to show that the statutes of Louisiana do not recognize or enforce such rights, even if they were sound?

The enforcement of equitable liens arising from contracts is a branch of the great equitable remedy of specific performance, which is also assigned by Mr. Pomeroy to the exclusive jurisdiction. Id. § 171, No. 3.

The proposition that State legislation can limit or destroy the *exclusive* equity jurisdiction of the Federal Courts is absolutely unsound. If such legislation can destroy their *exclusive* equity jurisdiction to recognize and enforce equitable liens, it can equally destroy every other branch of their equity jurisdiction.

The State might pass statutes of the following tenor and effect:

1st. Parties to a contract shall not be entitled to enforce specific performance thereof, but the sole remedy for breach of contract shall be by an action of damages.

2d. Parties shall be bound irrevocably by the express terms of their contracts, and shall be entitled to no relief on the ground of *accident, mistake or fraud.*

3d. Nothing shall be considered as done except that which has been actually done, and the rule that that shall be considered as done which ought to be done shall in no case be applied.

4th. What are known as equitable rights shall not be enforced, but no rights shall be recognized except those derived from the express terms of the statute of the State.

If such statutes were passed and were binding on the Federal Courts of the United States sitting in Louisiana, what would remain of the equity jurisdiction of the Federal Courts?

Nothing except a vain and senseless system of judicial procedure, having no rational object or purpose, and no application to any substantive rights whatever to the enforcement of which the system was adapted and for the enforcement of which it was devised.

The effect would be to convert the State of Louisiana into a little island in the midst of the great sea of Federal Equity jurisdiction which embraces all the other States of this Union, at the shores of which the argosies of equity jurisprudence must halt and turn away to more congenial climes.

The proposition seems to us utterly untenable. It is in irreconcilable contradiction with the following cardinal principles which regulate and define the equitable jurisdiction of the Courts of the United States, to-wit:

1st. That the equity jurisdiction of the Courts of the United States is derived exclusively from the Constitution and laws of the United States.

2d. That this jurisdiction, in the language of Mr. Pomeroy, "exists uniformly and to its full extent throughout the entire Union, independent of and unaffected by any State laws or any particular system of jurisprudence and legislation adopted by individual States," and "is wholly unmodified and unabridged by State legislation which deals with subjects belonging to the general system of equity jurisprudence. State laws subtracting from or limiting the scope of equity do not act upon the general powers and jurisdiction held by the national Courts."

1st Pomeroy, Secs. 292, 3, 4.

3d. That Section 721, U. S. Revised Statutes declaring "the laws of the several States shall be regarded as rules of decision in trials at common law in the Courts of the United

States, "does not apply to cases in equity, in which cases the principles of *equity jurisprudence*, and *not* the laws of the State are the rules of decision."

Every one of the foregoing cardinal principles is firmly established by the consistent jurisprudence of the Federal Courts from the foundation of the government until now, and not one of them was ever before, to our knowledge, seriously controverted. From the mass of authorities on the subject, we select the following:

"The Courts of the United States have jurisdiction in equity derived from the Constitution and laws of the Union, which is uniform throughout all the States."

Robinson vs. Campbell, 3 Wheaton, 212.

Neves vs. Scott, 13 Howard, 268.

Fitch vs. Creighton, 24 Howard, 159.

"The equity jurisdiction of the Courts of the United States is derived from the Constitution and laws of the United States. Their powers and *rules of decision* are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. In *all* these respects they are unaffected by State legislation."

Noonan vs. Lee, 2 Black, 509.

"While the Courts of the Union are required by the statutes creating them to accept as rules of decision in trial at *common law*, the laws of the several States, their jurisdiction *in equity* cannot be impaired by the local statutes of the different States in which they sit. * * * The equity jusisdiction of the Courts of the United States is the same that the High Court of Chancery in England possesses, and is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union."

Kirby vs. Lake Shore R. R., 110 U. S. 130.

"Chancery jurisdiction is conferred on the Courts of the United States by the Constitution, under certain limitations; and, under these limitations, the usages of the High Court of Chancery in England, which have been adopted as rules by this Court, furnish the *chancery law* which is exercised in all the States, and even in those where no State chancery system exists.

"Under this system, where relief can be given by the English chancery, similar relief may be given by the Courts of the Union."

State of Pennsylvania vs. The Wheeling, etc., Bridge Co., 15 Howard, 519. (Syllabus).

"It was not the intention of Congress, by the enactments relating to the adoption of State Laws in the Courts of the United States, to confine the Federal Courts to the same remedies which existed in the Courts of the respective States. Such a rule would forbid equitable jurisdiction to the Federal Courts sitting within those States which have no Courts exercising such jurisdiction. The true rule is that the remedies in the Courts of the United States are to be at common law or in equity, not according to the practice of the particular State, but *according to the principles of common law and equity jurisprudence*, as those systems are distinguished and defined in England."

Supreme Court, 1818, Robinson vs. Campbell.

3 Wheat. 212, 222, S. P. 1819, United States vs. Howland, 4 Id. 108, 115.

"The Supreme Court is not bound by the decision of a State Court upon a question of equity jurisprudence. The Constitution having recognized equity as a branch of jurisprudence, *whenever a case in equity arises under the judicial power of the United States it is for the Courts of the United States, and for the Supreme Court, in the last resort, to decide the principles applicable to it.*"

4 Wheat. 115; 3 Id. 222; 6 Pet. 658; 9 Pet. 614; 12 How. 139; Supreme Ct. 1851, Neves vs. Scott, 13 How. 268.

"The jurisdiction of the Federal Courts cannot be affected by State legislation, and they will enforce equitable rights created by such legislation if they have jurisdiction of the subject matter and the parties."

Supreme Ct. 1878, Smith vs. Railroad Co., 99 U. S. 398.

"The State laws furnish the rule of decision in the Courts of the United States in cases at common law, *but the equity jurisdiction of those Courts is one and the same in every State, and is in no respect dependent upon local law.*"

2nd Cir. 1837, Lamson vs. Mix, 6 Hunt Mer. Mag. 72; 3rd Circ. (Pa.) 1826, McFarlane vs. Griffith, 4 Wash. 585.

"The rule that decisions of a State govern Federal *law* Courts sitting in civil matters within that State, *does not apply to the administration of equity; which is, in such case, governed entirely by the general principles of Courts of Equity.*"

6th Circ. (Ohio) 1861, Burt vs. Keys, 3 West. L. Month. 290.

"The practice of resorting to a Court of Chancery in order to set up an equitable against the legal title cannot now be shaken. In all cases in which a Court of Equity takes jurisdiction, it will exercise that jurisdiction *on its own principles.*"

Supreme Court, 1809, Bodley vs. Taylor, 5 Cranch 191.

"The remedies in the Courts of the United States are to be at common law or in equity, not according to the practice of the particular State, but according to the general principles of common law and equity jurisprudence, as those systems are distinguished and defined in England."

Supreme Court, 1818, Robinson vs. Campbell, 3 Wheat. 212, S. P., 1819, United States vs. Howland, 4 Wheat. 108.

"State laws cannot impair the equity jurisdiction of the Federal Courts. If the common law did not afford a remedy, but resort to equity was permitted on account of the defect, parties whose citizenship gives jurisdiction may still apply to the Circuit Court for equitable relief, nothwithstanding that as between citizens of the State a State law has provided a legal remedy for cases of like nature. Supreme Court, 1868, Payne vs. Hook, 7 Wall, 425; 1st Circ. (Mass.), 1836, Gordon vs. Hobart, 2 Sumn. 401; 1855; Cropper vs. Corburn, 2 Curt. C. Ct. 465; 4th Circ. (Va.), 1877, Vreeden vs. Lee, 2 Hughes, 484. 5th Circ. (La.), 1871, Noyes vs. Willars, 1 Woods, 187; 1884, Fletcher vs. New Orleans, &c. R. R. Co. 20 Fed. Rep'r. 345; 8th Circ. (Col.), 1881, Strettel vs. Ballou, 9 Fed. Rep'r. 256; 3 McCrary, 46; and see United States vs. Howland, 4 Wheat. 108."

"The distinction between law and equity is recognized and established, for the National Courts, by the Constitution and the acts of Congress regulating procedure, and cannot be obliterated, with respect to those Courts, by any statutes of a State. Notwithstanding a reformed code of procedure of a State declares that the distinction between law and equity is abolished, and that there shall be but one form of action—a civil action—if a complainant resorts to a Federal Court he must proceed at law or in equity, according to the nature of his case. If he files a bill in equity when he has an adequate remedy at law, his bill may be dismissed even on appeal."

Supreme Court, 1867, Thompson vs. Railroad Companies, 6 Wall. 134. To nearly same effect, Supreme Ct., 1870, Walker vs. Dreville, 12 Wall. 440. S. P., 7th Circ. (Ohio), 1872, Butler vs. Young, 1 Flippin, 276; 7 West. Jur. 59; 6 Am. L. J. 53; N. Dist. of Ga., Shuford vs. Cain, 1 Abb. U. S. 302.

"The distinction between the enforcement of legal rights and the pursuit of equitable remedies in the Circuit Court, is well defined by law, and must be maintained."

Circ. of Cal., 1858, Loring vs. Downer, McAll 360; Byrd vs. Badger, Id. 443.

"*In that class of cases in which Courts of equity exercise their own peculiar jurisdiction* they do not consider themselves bound by statutes of limitation as obligatory laws, but usually apply them by way of analogy; unless injustice will result from so doing. 1st Circ. (N. H.), 1828, Sherwood vs. Sutton, 5 Mas. 143; (R. I.) Pratt vs. Northam, Id. 95; (Mass.), 1862; Badger vs. Badger, 2 Cliff. 137; (Me.), 1874, Sullivan vs. Portlrnd & Kennebec R. R. Co., 4 Id. 212; 3rd Circ. (Pa.), 1831, Baker vs. Biddle, Baldw. 394; 4th Circ. (Va.), 1880, Etting vs. Marx, 4 Fed. Rep'r. 673; 4 Hughes, 312; 5th Circ. (La.), 1880, Chapman vs. Wilson, 4 Woods, 30; 6th Circ. (Mich.), 1883, Crewett vs. Moran, 17 Fed. Rep'r. 820; 8th Circ. (Me.), 1883, Fogg vs. St. Louis, H. & K. R., &c. Co., Id. 871. See also Union Bank of Louisiana vs. Stafford, 12 How. 327; Orendorf vs. Budlong, 12 Fed. Rep'r., 24."

"The fact that the statute of limitations of the State has barred the claim in the State Courts will not prevent a Federal Court from entertaining a suit brought by a receiver of a national bank against the estate of a decedent for the recovery of a debt alleged to have been fraudulently concealed."

8th Circ. (Mo.), Johnston vs. Roe, 1 Fed. Rep'r., 692; 1 McCrary, 162; 10 Cent. L. J. 328; 9 Rep'r. 672.

"The provision of Rev. Stat. 721,—making the limitation laws of the States applicable to like actions brought in the National Courts—does not include special limitations upon suits in equity. Hence Section 378 of the Oregon Civil Code, prescribing a limitation of five years as to a suit in equity to affect a patent to land, is not binding upon the Circuit Court, sitting in that State. If however the circumstances of the particular case render it equitable and judicious to adopt the statute rule, the Court, in the exercise of its discretion as a Court of equity, will do so. 9th Circ. (Or.), 1875, Hall vs. Russell, 3 Sawyer 506."

"The Congress of the United States, in the act by which the Federal Courts were organized, enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply.' Rev. Stat., Sec. 721; Judiciary Act, 24 Sept., 1789, c. 20, Sec. 34, 1 Stat. 92. This Statute has been often the subject of construction in this Court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded 'as rules of decision in trials at common law' is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

"The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offences against the United States (see United States vs. Reid, 12 How. 361), or where the Constitution, treaties or statutes of the United States require other rules of decision."

Bucher vs. Cheshire R. R. Co., 125 U. S. 582.

It has been further held that Section 721, Revised Statutes, does not apply even in law cases to questions of a general nature, such as Commercial Law, Law of Public Carriers, Law of Negligence, of Master and Servant, etc.

See 18 Wallace, 546, 16 Peters, 1, 102 U. S. 14; 100 U. S. 239; 138 U. S. 67; 147 U. S. 106; 145 U. S. 605; 152 U. S. 282; 70 F. R. 679; Idem, 468; 45 F. R. 749.

See also Judge B. R. Curtis' Lectures on Jurisdiction and Jurisprudence of Courts of the United States, pp. 13 and 213.

These cases illustrate how strongly the Federal Courts resist the invasion of their powers and prerogatives by State statutes.

The suggestion that all these decisions only apply to *rules and forms of equity practice and procedure* and not to the substantive equitable rights of the parties, is contradicted by the very terms of the authorities themselves, which make it clear that the rules of decision adopted by the National Courts in equity cases in determining *equitable* rights and principles, are *not* the laws of the States, but are the rules and principles of equity jurisprudence.

The doctrine of equitable liens is derived from and founded exclusively upon the principles of equity, as established by equity jurisprudence. The power to recognize and enforce such liens is an element of equity jurisdiction conferred by the Constitution and laws of the United States. State laws did not confer this power and cannot take it away. It exists in all the other States of this Union, and the principle of uniformity requires that it should exist equally in the State of Louisiana.

May it please the Court :

It is in the nature of things that these repeated and emphatic decisions cannot be ignored, or robbed of meaning, or held to be overruled by other decisions which do not, in terms, over-

rule. When cases are quoted which contain apparently contradictory doctrines, the Court will look at all the decisions together, and find some principle on which they may be reconciled. We believe that principle is easily found and clearly apparent. It is this, that as to matters falling within the *concurrent* jurisdiction of equity, legislation of the States will receive consideration and effect, but that with regard to purely equitable rights, arising under the exclusive equity jurisdiction, rights *created* by equity, solely and exclusively *because* they are *not* recognized by law, the decisions quoted and relied upon by us will apply and govern.

We have examined with great care the authorities referred to by our learned adversaries, and we find not one which derogates from the principles sustained by this jurisprudence as applicable to cases arising under the *exclusive* equity jurisdiction.

Of these authorities the following will be found to be cases at common law:

Burgess vs. Seligman, 107 U. S. 20.

Pana vs. Bowles, 107 U. S. 541.

Carroll vs. Smith, 111 U. S. 556.

Andreson vs. Santa Anna, 116 U. S. 362.

Bowles vs. Brimfield, 120 U. S. 764.

Folsoms vs. Township, 159 U. S, 625.

Bank vs. Earl, 13 Peters, 519.

Greene vs. McNeil, 6 Peters, 291.

Suydam vs. Williamson, 24 Howard, 427.

Leffingwell vs. Warren, 2 Black, 600.

Telle vs. Walker, 11 U. S. 242:

Of course the *dicta* in such cases have no application to equity jurisdiction. The equity cases referred to are:

Hedges vs. Dickson, 150 U. S. 182.

Lumber Co. vs. Ott, 147 U. S. 628.

Bank vs. Bank of Kansas City, 136 U. S. 235.

Ewing vs. St. Louis, 5 Wallace, 419.

May vs. Tenny, 148 U. S. 64.

Casey vs. Cavaroc, 96 U. S. 497.

Brine vs. Ins. Co. 96 U. S. 627 and others.

An examination of these cases will show that all of them were cases which fell within the *concurrent*, and not within the *exclusive* equity jurisdiction, and that the rights involved therein were not equitable rights created by equity, but rights based upon and derived from the law of the State.

In Hedges vs. Dickson, the Court simply held that a contract absolutely void under the Constitution and laws of the State by reason of the absolute incapacity of the party, a municipal corporation, to make it, could give rise to no rights, either equitable or legal, a familiar principle of equity. *Ex nihilo nihil fit*.

Lumber Company vs. Ott involved nothing but rights claimed under an assignment for the benefit of creditors made in pursuance to a State statute, and the validity of which depended upon compliance with the statute.

Union Bank vs. Kansas City Bank, and May vs. Tenny involved precisely the same question.

A careful examination of the case of Casey vs. Cavaroc will show conclusively that no equitable lien was claimed or involved, but that the right asserted was based upon a statutory pledge, the validity of which depended upon compliance with the statute. In the statement of the case, at page 468, we find that the parties based their right to the securities upon the claim that they were "actually pledged" to them. In the argument of their counsel, as set forth at page 473, it will be found

that the contention was solely that the pledge was valid. In the opinion of the Court, at page 486, it is stated:

> **"It must not be overlooked that the Credit Mobilier has no *other* claim to the securities in question but that of *pledge*. A pledge and possession which is its essential ingredient must be made out, or their *privilege* fails."**

It is clear that the case involved nothing but a claim of statutory right, which was, of course, to be determined according to the statute in equity, as well as at law.

The case of Ewing vs. St. Louis, 5 Wallace, 417, was a case involving simply the validity of proceedings taken in pursuance of a State statute, on the ground that the proceedings did not comply with the statute.

Brine vs. Insurance Co., 96 U. S. 627, only held that a State statute which allows the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to his judgment creditor three months after that, governs to that extent the mode of transferring the title, and that a Federal Court in Equity would no more deny that right than would a State Court.

We have no knowledge of any principle within the exclusive equity jurisdiction that denies such a right.

We have not time to analyze or to refer to the other equity cases quoted by counsel, but we hazard nothing in saying that of them were cases in which the rights involved were rights arising under the concurrent jurisdiction. We believe no case can be found in which a Federal Court of Equity has refused to enforce a *purely equitable* right, *created* by equity for the very reason that it was *not* allowed by law, on the ground that the State statutes did not recognize it.

None of these cases has the slightest application to the question in the case at bar, which involves a purely equitable right,

created by equity, and existing independently of any State statute.

The quotation from Sec. 297 of 1st Pomeroy, must be read in connection with Sections 291, 292, 293, 294, 295 and 296; and also with Sections 137, 138 and 139, which define the distinctions between the *exclusive* and the *concurrent* equity jurisdiction, and especially with Section 427, which confines the maxim *equitas sequitur legem*, to cases within the *concurrent* jurisdiction and excludes it from all application to cases within the exclusive equity jurisdiction, in which:

"The primary right violated or to be declared, maintained or enforced, whether such right be an estate, title or interest in property, or a lien on property, or a thing in action arising out of contracts, is *purely equitable and not legal;* a right, title, estate or interest *created* by equity and not by law."

1st Pomeroy, Sec. 137.

In the latter cases, it is clear that the statutes of the State cannot abridge or impair equitable rights or remedies created by equity, independently of law.

The suggestion that the doctrine of equitable liens does not apply to the case of an insolvent debtor would rob the doctrine of application to the only case in which it would serve any useful purpose. If the debtor was solvent and had means sufficient for the satisfaction of all his debts, there would not be the slightest reason for subjecting particular property to a special lien.

If the Ferris Co. were solvent, and if the funds in the hands of the receiver were sufficient to satisfy all of its debts, we would not be here, pressing our claim for a lien on this particular fund. It is because the Ferris Company is insolvent, and the funds in the hands of its receiver are insufficient to satisfy all its debts, that we assert our lien upon this particular fund.

Equity recognizes this lien, and this Court, sitting as a Court of equity, will enforce it.

This case does not arise under the insolvent laws of the State of Louisiana. It is a case arising under the purely equitable jurisdiction of this Court, in the exercise of which this fund has been brought within the custody of the Court, to be marshalled and distributed by the Court to those who are entitled to it, and in distributing it, it is sitting as a Court of equity, and will recognize and enforce the equitable rights of parties as well as their legal rights.

There are no conflicting liens on this bounty. Our lien is confined by the decree to the bounty on the cane produced by ourselves, and no other creditor pretends to have any special lien upon it. It is a conflict solely between our equitable lien and the claims of the general creditors. To deny the lien in such a case would be an effectual obliteration of the equitable power of this Court to recognize an equitable lien in any case.

We claim this lien is a right *created* by equity, founded on the eternal principles of *justice*, enforced by equity in the exercise of its *exclusive* jurisdiction under power derived from the Constitution and laws of the United States, which State statutes did not *confer*, and cannot *take away*.

This involves no infringement of State rights. The States themselves consented to the delegation of this power and jurisdiction. The Constitution of the United States and laws passed in pursuance thereof, are as much laws of every State as any statute of the State itself.

We claim, therefore, that the legislation of the State of Louisiana cannot abridge the right of a Court of the United States, sitting in equity, to recognize and enforce equitable liens.

(2.)

The other proposition that the Civil Code of Louisiana pro-

hibits the enforcement of equitable liens is equally untenable.

State laws and State decisions upon the subject of "privileges" have not the remotest application to the subject of equitable liens. The Louisiana "privilege" and the equitable lien are not merely different, but are radically contradictory and antithetical concepts.

The Louisiana "privilege" is derived exclusively from the *law;* the equitable lien is derived from the contract of the parties. To say that there can be no equitable lien in any case in which the law does not grant a privilege, is to destroy the very reason for which the equitable lien is granted. If the law granted a privilege, there would be no need to claim an equitable lien. Many rights may be created by the express terms of a contract, which would not be implied by law in the absence of express agreement. There is, therefore, not the slightest inconsistency in saying that although the law does *not* grant a *privilege*, the contract of the parties may establish an *equitable lien*, which is *not* a privilege. We say, therefore, that the laws of the State prescribing the cases in which the law grants a *privilege* independent of any contract between the parties, and decisions of the State Court interpreting those laws, have no application to the subject of *equitable liens*. No law of the State of Louisiana and no decision of her Supreme Court can be found which declares that the doctrine of equitable liens arising from contract is forbidden by the law of Louisiana. Our researches have failed to discover but three cases which ever dealt with the subject of equitable liens under the law of Louisiana. One is the case of Wheeler vs. Insurance Company, 101 U. S. 439. It was a case arising in Louisiana, and under Louisiana law, in which a purely equitable lien was claimed and enforced, and in which there was no pretense that

the party had any statutory privilege, and there the Supreme Court of the United States said:

"The equitable doctrine upon which appellant's claim is founded undoubtedly obtains in Louisiana. It is derived from the civil law which is the basis of the Civil Code of that State."

The other cases are the cases of Succession of Walsh, 9 An. 543, and Webre vs. Beltran, 47 An. 195, which will be referred to hereafter.

We deny that any decision to the contrary can be found or has been made by the Supreme Court of Louisiana, and we believe that the decision of the Supreme Court of the United States on this point is correct.

The Civil Code of Louisiana establishes as broad a system of equity as it is possible to conceive of. We call attention to the following articles of that Code:

Art. 21. "In all civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages where positive law is silent."

Art. 1903: "The obligation of contracts extend not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incideatal to the particular contract, or necessary to carry it into effect."

Art. 1964: "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources."

Art. 1965: "The *equity* intended by this rule is founded on the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract. are silent. Courts must apply these principals to determine what ought to be incidents to a contract, which are required by equity."

The Rubric of the Code under which the two last articles are found, is headed: "Of the obligations to *perform*, as incidents to a contract, *all* that is required by *equity*, usage or law."

The remedy for the enforcement of equitable liens is a branch of the great equitable remedy of Specific Performance, which

is a simple exertion of the power of the Court to enforce specifically the obligations of the contract. Differently from the Common Law and from the Code Napoleon, the Civil Code of Louisiana expressly recognizes the remedy of specific performance of contracts:

Art. 1926: "On the breach of any obligation to do or not to do, the obligee is entitled to damages, or, in cases which permit it, to a specific performance of the contract at his option, etc."

Art. 1927: "In ordinary cases the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the Courts."

These articles were fully discussed by our Supreme Court in the case of Levine vs. Michel, 35 An. 1126.

There is, and can be, no rational denial that the obligations assumed by the Ferris Company in its contract with intervenors were perfectly lawful and binding on the company, and there can be no reason why specific performance thereof should not be enforced. The fact that the contract was not effectual to create a legal privilege under the statutes of Louisiana, presents no obstacle whatever to compulsion of its specific performance.

The Supreme Court of Louisiana has expressly recognized the doctrine that an equitable right to be paid out of a fund by preference over the general creditors may result from the contract between the parties, although that contract did not create a legal privilege. Such an equitable right was enforced in the case of the Succession of Walshe, 9 An. 543, where the Court began its decision by saying:

"It may be conceded that the Company is not entitled to a *privilege* upon the fund in dispute, using that term in its technical sense. But we think the equity of the Company to receive this fund by reason of the peculiar terms of their contract with Walshe, and the circumstances of the case, is clear."

The Court further says:

"It seems to us it would be a clear violation of the terms and spirit of the contract, and of the reservation made in the Judge's order, to take the fund from the Company, and distribute it *pro rata* among all the creditors. This case is the first of the kind presented for the consideration of this Court, and our attention has not been directed to decisions of other tribunals upon the precise subject. But we find a very satisfactory analogy in the rule of the Supreme Court of Pennsylvania, in Morgan vs. Bank of America. 8 Serg. and R. 73."

This was a plain case of equitable lien upon a fund, arising from contract, and not accompanied by any technical privilege, which was enforced by the Supreme Court of Louisiana.

The case of Webre vs. Beltram, 47 An. 195, is a very parallel case to the one at bar. It was a case of insolvency, and involved the distribution of bounty collected, precisely as in this case. Beltram did not claim to be the *owner* of the bounty, and he did not claim any technical *pledge* or *privilege* on the bounty, but he claimed that under his contract with the insolvent he was entitled to have his debt paid out of the bounty by preference over other creditors.

The case is very instructive, but we will content ourselves with quoting only one paragraph, to show how plainly the Court enforced an equitable lien arising from contract solely, in opposition to the claims of the syndic of the insolvent and the general creditors under the Articles of the Code relied on in this case:

"In reference to the bounty collected by Beltram & Co., it is claimed that the law gave no privilege or pledge to the defendant upon that fund, and that not having been collected from the government at the time of the surrender it should be turned over to the syndic to be disposed of as the common pledge of all the creditors. It may be true that neither a privilege nor a pledge resulted by law in favor of Beltram & Co., by reason of their being furnishers of supplies, and that it would be necessary for them to base their right on contract, but this is precisely what they do. They rest upon the verbal contract between the parties made in the beginning of the year 1892, and the stipulations of the parties in regard to it." Page 202.

The Court maintained the contract right of Beltram to be paid out of the bounty by preference over all other creditors.

We consider these two cases decisive of the question that the Courts of Louisiana will and do recognize and enforce equitable liens arising from contracts by preference, in proper cases, over technical privileges.

It is, moreover, a familiar principle of the law of Louisiana that privileges and mortgages only take effect upon the property of a person in the condition in which that property was at the time when the party acquired it, and that such privileges and mortgages are subordinate to legal rights created and existing at the time of his acquisition of the property.

In this case, the cane of these intervenors passed into the ownership and possession of the Ferris Company, subject to the express agreement and obligation that the bounty which might be collected on sugar produced from this particular cane should be devoted to the payment of intervenor's claims, and should be subject to an equitable lien for the satisfaction thereof. The property passed into their possession and ownership subject to these rights and obligations, and they cannot be displaced or impaired by any liens or privileges which the law might create upon the property *after* its acquisition by the Ferris Company.

There cannot be the slightest doubt that if this case was before the Supreme Court of Louisiana, that tribunal would recognize and enforce the right of these intervenors to have their contract executed, and to be paid out of this fund in preference to any other creditors of the Ferris Company, and that any privilege that such creditors might have, would be subordinated to the clear equitable right of intervenors, subject to which only, the Ferris Company acquired the property.

We, therefore, maintain that the second proposition on which the contention of appellant is founded is equally as fallacious as the first.

On the whole we submit that all the questions certified to this Court should be solved in favor of appellees, and that this Honorable the Circuit Court of Appeals should be advised to affirm the decree appealed from.

Respectfully submitted,

CHAS E. FENNER,

Solicitor for Payne et al., Appellees.

Office Supreme Court U. S.
FILED
APR 20 1897
JAMES H. McKENNEY.
Clerk

SUPREME COURT OF THE UNITED STATES.

No. 722.

THE BURDON CENTRAL SUGAR REFINING CO. ET AL.,

versus

JACOB U. PAYNE, ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR READING IRON COMPANY, APPELLEES.

FRANK McGLOIN,

JAMES DAVID COLEMAN,

Solicitors for Reading Iron Co., Appellees.

Kolb & Lecler, Book and Job Printers, 516 Natchez St. N. O. La.

SUPREME COURT OF THE UNITED STATES.

No. 722.

THE BURDON CENTRAL SUGAR REFINING CO. ET AL.,

versus

JACOB U. PAYNE, ET AL.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR READING IRON COMPANY, APPELLEES.

On behalf of the Reading Iron Company, it is desired to present only one issue; whether or not there is in this case, for the securement of the price of cane furnished by J. U. Payne, et als., a *lessor's privilege* upon the

movables in the Sugar House, including the Sugar Mill on which said Reading Iron Company has a vendor's privilege. It is necessary, however, for this Hon. Tribunal to decide all the questions certified up, in order that the rights of parties may be eventually fixed and disposed of. The vendor's privilege of the Reading Iron Company must, under the laws of the State of Louisiana, yield to the lessor's lien, but it would prime any mere conventional, or equitable lien, if any such should be recognized in this case.

So, if there should be a lien established in favor of Jacob U. Payne, et als., upon the bounty money, the holders of special vendor's privileges may then insist upon the prior exhaustion of the fund so affected, before the property particularly charged with vendor's liens in their favor can be taken to their detriment.

The considerations and authorities herein submitted are from the briefs presented, by Counsel for the Reading Iron Company, for the consideration of the Circuit Court of Appeals.

The equitable principle of equality among creditors has in Louisiana been established as a rule of positive law. La. C. C. 3183 declares the property of the debtor to be the common pledge of his creditors and enjoins the ratable distribution among all creditors of the proceeds of the sale of the debtor's property, "unless there be some *lawful* causes of preference."

"Lawful" as here employed, means, "constituted by law."

C. C. Art. 3184 specifically defines "lawful causes of preference," to be "mortgages and privileges."

The authoritative definition of a privilege, as given in the Civil Code, Art. 3185, is absolutely exclusive of the idea of a conventional, or a merely equitable lien. "Privilege," says this Article, "can be claimed *only for those debts, to which it is expressly granted in this Code.*"

As though to emphasize the prohibition of mere conventional liens, C. C. Art. 3186 defines a privilege as "a right, which the *nature of the debt* gives to a creditor."

To the same effect is the practically unbroken jurisprudence of the State, as established by its highest tribunal, and as always maintained. See Hoss vs. Williams, 24 Ann. 568; Fisk vs. Moore, 11 Rob. 280; Grant vs. Foil, 17 La. Ann. 162; Hoffman vs. Laurens, 18 La. 73; Gause vs. Bullard, 6 La. Ann. 107; Succ. Rousseau, 23 La. Ann. 3; State vs. Citizens' Bank, 33 La. Ann. 706; Citizens' Bank vs. Maureau, et. als. 37 La. Ann. 861.

There is no preventing parties from making at one time a multiplicity of contracts, and evidencing them all by one and the same writing. The mere fact that they are thus evidenced by one single document, does not destroy legal definitions or obliterate legal distinctions.

The various contracts thus thrown together still retain their respective natures and give rise each only to the rights the Code has predicated upon conventions of its character. C. C. Art. 2079. Friedler vs. Chotard, 36 A. 277.

The Civil Code of Louisiana defines the contract of sale as "an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself." C. C. 2439.

The lease of a thing the Code defines, C. C. 2674, in our law as "a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing during a certain time for a certain stipulated price which the other binds himself to pay him."

The essential difference between these two contracts of sale and lease is carefully preserved in the Civil Code, when it comes to providing the privilege which is to secure the credits which may arise in connection with each. The lessors's privilege, or right of pledge, is confined to the movable effects of the lessee or others "*found on the leased premises.*" C. C. 2705, 2707. The vendor's privilege, on the other hand, is restricted to the price of his property "sold and not paid for," C. C. 3227.

These two contracts are radically different. One transfers the ownership, the other does not effect the title but passes possession only.

They are irreconcilable as oil and water, incapable, as to one and the same thing, of mixture. The law considers the nature of the convention, and if for a price it changes title there is a sale and no lease. If possession only be affected, the contract must be held a lease and not a sale.

It would not have been within the power of the parties to the contract under discussion to have destroyed the legal distinctions between contracts, established by the Code. They could not, by convention, have at one and the same time sold and leased the self same thing. They could not set up by stipulation a lessor's privilege to secure an unpaid portion of the price of an object absolutely alienated, or make same bear to the predjudice

of other lien creditors upon other movable effects which had never belonged to the seller.

Had the Paynes owned two separate plantations, they could have sold one and leased the other to L. M. and W. L. Ferris, by a single deed. This putting together of the two contracts into one deed would not have fused the two contracts, and could not have given for the purchase price of the lands sold, a vendor's lien upon the movables located upon the plantation leased. Neither could a lessor's privilege, to secure the rent of the property leased, be extended so as to effect by special pledge, the property actually alienated.

In this particular case, J. U. Payne & Co., did not, it is true, lease one plantation and sell another in the same writing. But they did sunder their lands into two parcels, leasing for a time and price fixed one part thereof, with the sugar house, etc., and retaining the remainder. See contract, Article 1 to 5, inclusive. This remainder, J. U. Payne & Co., were themselves to cultivate, and the crop upon their portion, by distinct articles of the agreement, they were to sell, and L. M. & W. L. Ferris agreed to purchase under certain conditions. See contract. Article 6 et seq.

It may be, in the case first put, that the fact that the original owner of two plantations is principally moved to lease one and sell the other by the consideration that he is able thus, at one and at the same time, to disembarrass himself of the care of the entire property, and that he would never have consented to either sale or lease separately. So, in this instance, it may be that J. U. Payne

& Co., would never have parted with the control of their sugar house by lease, unless some means were secured for the disposition of their own crops, to the lessor, or to some other person, or persons, equally equipped for purchasing and grinding cane. Such contingency might in either case make the contract an entirety, in the sense that no action for rescission would lie against either of the distinct conventions, without involving both. Burt Co. vs. Laplace, 46 La. Ann. 729.

But it could not effect the fusing of two contracts absolutely unto one; and especially contracts so essentially irreconcilable as those of lease and sale.

The parties in the contract now before the Court have not attempted in the writing itself any such unnatural fusion, as is now contended for. On the contrary, in preamble and in articles, they show themselves fully alive to the legal distinctions between a sale and a lease, and they particularly declare themselves making a dual contract, and they point out specifically the property to be effected by each. "Whereas," it is said in the second preamble, "the said L. Murray Ferris and Wm. L. Ferris, parties to the second part, as aforesaid, have proposed to contract upon the terms and conditions hereinafter provided, *for a lease of the Barbreck Sugar House and the purchase* of the crops of the *three aforesaid plantations*.

The contract as a whole, is divided actually into two parts, the first, Articles 1 to 5 inclusive, regulating the relations between the parties as landlord and tenant, the second, Articles 6 to 13 inclusive, governing the contemplated sale of crops.

The learned judge *a quo* has considered this conglomerate writing as evidencing a contract of lease and regarded the stipulation providing for purchase of future crops as entirely subordinate, and a mere adjunct of the lease. The articles of the contract regulating the sale of crops are as numerous and elaborate as those effecting the lease of the sugar house: why not with equal reason fix upon the agreement to sell and purchase as the covenant, and reduce the lease clauses to the subordinate position making them mere parts and parcels, or adjuncts, in a contract of sale?

It is, as a matter of fact, certain that on the part of L. M. & W. L. Ferris, the ruling purpose was the purchase of J. U. Payne & Co's cane, in order to manufacture the same at a profit into sugar. The leasing of the sugar house was a mere provision for implements, or means, to enable them to handle and convert the cane bought. So, there is no reason to doubt that the New Orieans commission house of J. U. Payne & Co., et als., had in mind principally the sale of their own cane in the fields, without the trouble, expense and risk of grinding, and that they placed, by lease, their sugar house in the hands of the contemplated purchasers, in order to put the latter in a condition to handle the cane when bought.

The parties themselves originally, in their contract, did not stipulate that the lease was to be the master convention: should the Courts speak, where parties interested have kept silent?

J. U. Payne & Co., are here contending for a construction of the contract in question, which will accord

themselves special privileges and a crushing advantage over the other creditors. Why should the presumptions go in their favor, and they be allowed to fix, and particularly at this late date, to their great advantage, the nature of lease, rather than of sale, upon this contract?

By Article thirteen of the contract, J. U. Payne & Co., et als., have contented themselves with stipulating, for a conventional lien *upon the bounty to be received* to secure themselves in the payment of the price of cane to be sold. Under what provision of law is this stipulation to be enlarged, and Appellees given, for this price, *a lessor's lien upon the machinery belonging to the Ferris Company, and affected with vendor's liens?* Confiscation Cases, 1 Woods, 227.

The principle "inclusio unius est exclusio alterius," applies with most force to contracts. In the first place, a benefit not given by the terms of the convention, cannot be judicially recognized. A fortiori, is it inadmissible, when parties have detailed what they are to take, to enlarge, in either behalf, the advantages contracted for.

III

Article C. C. 2705 must be in this case interpreted in unison with the other provisions of the Code of this State. Especially must it be made to harmonized with the recognized general policies of our law. The attempt to interpret that article in such way as to secure by a lessor's privilege, rights which are clearly those of a vendor, is against the policy of this State in the matter of liens, which allows them to take their birth alone from the nature of the contract itself. Nor is there anything in the article

which warrants the securing of the price of property sold by a lessor's privilege upon property not involved in any shape in the contract of sale. The article does not grant unlimited license to parties to tack upon a lease any other contract they please, and then secure the obligations of that foreign convention by lessor's privilege. Had that been the intent, the article would have given the lien to the lessor "to secure his rent and the other obligations of the *contract*, a right to pledge, etc." Instead it has given the pledge, only to secure the "rent and other obligations of the *lease*."

The language used is restricted, and keeps this article in strict harmony with the laws of the State governing liens. The interpretation contended for by Appellees would not only bring this article in antagonism with other articles already cited of the Code, but it would be to actually change the language itself of the provision, and to greatly enlarge its scope, to the benefit of the few and the detriment of the many.

The references taken from the law and precedents of France are not applicable, considering the difference in the wording of the two articles; the one from the Code Napoleon and the other from our Louisiana Code. Neither is there in this case, the essential and intimate union between all the clauses of the contract, as in the French cases.

The parties might have tacked on to the lease a contract of partnership. Could they, thereby, have secured by lessor's privilege payment of the eventual balance, final liquidation might show due one partner or the

other? Suppose again, L. M. & W. L. Ferris had been constituted by the same deed, at one and the same time lessees and agents of the J. U. Payne & Co., et. als. would there be a lessor's privilege in such case, to secure the obligations arising from the agency?

Such suppositions might be undefinitely multiplied; and all goes to show that abounded confusion must ensue from fastening upon Art. 2075, La. C. C., the broad interpretation contended for.

Upon the question as to the convention under consideration in this case being in its nature two separate and distinct contracts, evidenced by one and the same writing, and the inapplicability of the French decisions cited by Counsel for Appellees, attention is called to Art. 2063, of the Civil Code of Louisiana, which reads as follows:

"A *conjunctive* obligation is one in which the several objects in it are connected by a copulative, or in any other manner, which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditors to receive them separately.

In the Code Napoleon, no such Article is found and it is the same, also, as to the Articles figuring in La. Code under the numbers 2062, 2064, 2065, 2066.

Under the French authorities, conjunctive obligations are considered all as one unit, and the debtor cannot dis-associate them, so as to obtain a discharge from one alone. Fruzier-Herman, Code Annotés, Vol. III, part

1. page 39, Note I, commenting on C. N. Art. 1189, is to following effect, and cites the authorities:

"Among obligations involving two or more distinct objects, the alternative obligation differs from the conjunctive, in that the latter is executed only by the presentation of every object due."

Such being the French law, the intention of the framers of the Code of Louisiana to depart radically therefrom, upon this branch of jurisprudence, is manifest. Among the changes thus instituted, none is more plainly expressed than the following, forming portion of Article 2063, La. C. C. "This contract *creates as many different obligations as there are different objects*, and the debtor, when he wishes to discharge himself *may force his creditor to receive them separately.*"

The full importance of this departure from the French law, and its pertinence to this case appears, when the significance is considered, under our codal definition, of this word "object." La. C. C. Article 1883, says "every contract has for its object something which one or both of the parties oblige themselves to give or to do, or not to do."

So, C. C. Art. 1886, enjoins that "an obligation must have for its object something determinate, at least as to its species. The quantity of the thing may be uncertain provided it be capable of being ascertained." See, also, C. C. 1779. La. C. C. 2063, therefore, keeps by statutory mandate, to an extent apart the two different "objects," set forth in the convention under considera-

tion, separates them for purposes of satisfaction, and by analogy of enforcement.

If such be the policy of the law even as between the parties to a deed; how much more is it a controlling principle, when the rights of the third persons intervene! If the contracting parties cannot knead into one, contracts differing radically in their nature; cannot confuse the distinctions and definitions set up in the Code: how shall they be permitted to destroy the rights of others, by beating down the barriers the statutes have erected between conventions of different characters, as to the privileges which secure, or the remedies which enforce them?

The Code of Practice of Louisiana gives the writ of provisional seizure, issueing without bond and under lenient conditions, to enforce the lessor's lien. C. P., Arts. 285, 287. The vendor's privilege is secured, pendente lite, by the different and less favored writ of sequestration. C. P. 275.

Could, in this case, Appellees have demanded at the outset a writ of provisional seizure, *to enforce a demand for the price of cane?* If not by what warrant are they here demanding under the strict and prohibitory provisions of the law of this State, a lessor's privilege, to *secure the price of property sold?*

This Court would, no doubt, consider itself bound in the premises by an authoritative decision of the Court of last resort for Louisiana; but it is demanding too much of this Hon. Tribunal, to go further, to hold itself obligated, also, by the conclusions of the French jurists; conclusions based upon an article broader than our own, and

under a policy, both as to liens and as to distinctions between contracts, more lax. The Courts of Louisiana have ever reserved the right to interpret for themselves the articles of our law, even where the text of the French Code is similar to our own, and have given to French commentators and jurists only the authority to which the logic of their enuntiations entitle them. This Honorable Tribunal will, therefore, determine for itself the issues here involved, considering always the radical differences in this connection, between the principles of the French law and those of the law of Louisiana.

As to the authorities from the Supreme Court of Louisiana, every case cited by Counsel for Appellant is one relating to some condition strictly germane to a contract of lease. Warfield vs. Oliver bore upon the obligation to do repairs, which, in default of conventional provisions, the Code itself, while dealing with leases, particularly regulates. C. C. Arts. 2715, 2716, 2717, 2718, 2694. In Fox vs. McKee, 31 La. Ann. 67, and Henderson vs. Meyers & Bro., 45 La. Ann. 791, the parties had agreed to pay attorney's fees upon the rental in case of suit. This was a provision pertinent to and consistent with the contract of lease. In same way, the highest conventional interest might be provided for, in default of prompt payment of rent, and the interest would clearly be secured by lessor's privilege.

But, where in all the volumes of Louisiana decisions, has it been held, that parties can roll into one contract a sale of movables and a lease of real property, or secure by lessor's privilege, the price of property?

See Case vs. Taylor, 23 La. Ann. 498.

Where has it been in these decisions held, that where two such immiscible contracts are spread on the same paper, the obligee may elect as to which shall be the master contract, and choose at his pleasure, whether he shall figure before the courts as lessor, or as vendor?

We have heard of evolution, and the survival of the fittest, but we know of nothing inherent in the nature of the contract of lease according to it a nobler nature, or giving it a superior vitality over the contract of sale. When Jonah and the whale came together, it was to be expected that the former should be swallowed: but there is no provision of the law of this State, making in every case where they may come in contact, a Jonah of the contract of sale, and of the contract of lease, the whale.

Respectfully submitted,

FRANK McGLOIN,

JAMES DAVID COLEMAN,

Solicitors for Reading Iron Co., Appellees.